

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1098

To be argued by
JONATHAN J. SILBERMANN

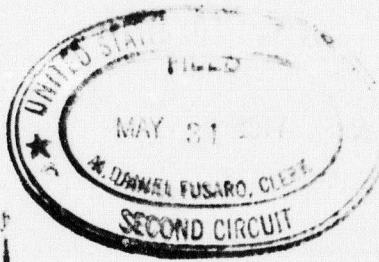
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
VICTOR RAMIREZ,
Defendant-Appellant.

B/S
Docket No. 77-1098

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

TY OFFEN
OR OFFEN
SDEMEAN
FELO

PAGINATION AS IN ORIGINAL COPY

CRIMINAL DOCKET - U.S. District Court

SE PO ☐ JUDGE ☒ Assigned U.S.
SE MO ☐ 0851
OR Mis ☐ Disp./Sentence
NY Fel ☒ 0208 1
Office

vs RAMIREZ, VICTOR

(LAST, FIRST, MIDDLE)

Case Filed
Mo. Day
03 25
No. of Dets
* 02

76 0296 02
Yr Doc# No Det

U.S. MAG. CASE NO. 76-359

BAIL - RELEASE

☐ Denied ☐ AMT ☐ Fugitive
☐ Set ☐ Pers Recog
\$ 20,000 ☐ PSA
Date ☐ 10% Deposit
☒ Surety Bond
☐ Bail Not Made ☐ Collateral
☐ Status Changed (See Docket) ☐ 3rd ☐ Pny Cust ☐ Other

U.S. TITLE/SECTION

OFFENSES CHARGED

ORIGINAL COUNTS

21:846 Conspir. to viol. Narco. laws.
21:812, 841 Distr. & possess. of Heroin I.

1
2

SUPERSEDING COUNTS

II. KEY DATES & INTERVALS

ARREST or

INDICTMENT ☒

ARRAIGNMENT

TRIAL

SENTENCE

U.S. Custody Began

High Risk Date

Information ☐

1st Plea

Trial Set For

Voi Dire ☐

Summons Served

Indict. Waived ☐

Superseding

Indict/Info ☐

Final Plea

☒ NG ☐ G ☐ NOL

(G Plea LW/Drawn)

Trial Began ☒ J

11-22-76

Trial Ended

11-30-76

Disposition of Charges

11-30-76

1-31-77

☒ Convicted ☐ On All Charges☐ Acquitted ☒ On Lesser Offense(s)☐ Dismissed: ☐ WOP: ☐ WP☐ On Government's Motion

MAGISTRATE

INITIAL/NO.

OUTCOME

Search Warrant

Issued

Return

DATE

INITIAL/NO.

INITIAL APPEARANCE DATE 3/19/76

PRELIMINARY EXAMINATION OR

Date Scheduled 03-29-76

REMOVAL HEARING

Date Held

☐ WAIVED☒ NOT WAIVED

Type Number

☐ INTERVENING INDICTMENT☐ DISMISSED

HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT

HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

Summons

Issued

Served

Arrest Warrant Issued

COMPLAINT

3/19/76

CJH-080G

OFFENSE

(In Complaint)

21 USC 812, 841(a)(1) and 841(b)(1)(A) - NARCOTICS

U.S. Attorney or Asst.

Alan R. Kaufman
791-0069

ATTORNEYS

Defense ☐ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD

Stuart Holtzman

335 Broadway

New York, N.Y. 10013

* Show last names and suffix numbers of other defendants on same indictment information.

Gutierrez et al.

DATE (DOCUMENT NO.)

PROCEEDINGS

EXCLUDABLE DELAY

(a) (b) (c) (d)

3-25-76 Filed indictment.

3-30-76 Deft. (Atty. present) pleads not guilty. Bail fixed by Magistrate cont'd \$10,000 cash or surety. Deft. Cont'd remanded in lieu of bail. Defts. motion for reduction of bail: motion denied. Case assigned to Pierce, J.

Filed second offender information..Bryan, J.

Filed notice of appearance for atty. Stuart Holtzman,
335 Broadway, N.Y. 10013.

3-31-76 Bail application hearin held (Att. present). Bail is reduced as follows: Bail fixed by court at \$10,000 P.R.B. signed by one brother and one sister and secured by \$250. cash. Bail limits::Deft. restricted to Eastern and S.D.N.Y. Pierce, J.

(Over)

DATE	Page #2 -Pierce J. DOCUMENT NO.	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY			
				Interval Section (1)	Start Date End Date (2)	LT Code (3)	Total Days (4)
02-01-76		Filed the following papers rec'd from Mag.Hartenstine.(Mag. # 76-359) Docket Entry Sheet Criminal Complaint Disposition Sheet Summary Report for Judge/Magistrate Notice of Appearance by Barbara Ann Rowan,335 Bway, NYC 10013 - 966-1000					
03-31-76		Filed Unsecured Bond(P.R.B) in the amount of \$10,000. - conditions that dft. post the sum of \$250.00 Cash with the Clerk,USDistrict,SDNY, Receipt #68156.acknowledged by the Clerk.					
04-08-76		Filed Mag. Temp. Commitment.					
04-07-76		Conference held -for both dfts. & their attys. present - AUSA present - Trial set for July 6,1976 at 9:30 - Bail Cont'd.Pierce J.					
04-15-76		Filed Remand dtd. 3-31-76.					
05-11-76		Filed Deft's. affidavit & notice of motion for severance of trial.					
05-11-76		Filed Deft's. affidavit & notice of motion for discovery & inspection, Brady Material & suppression.					
5-24-76		Filed Gov'ts Affdvt. in response to Dfts. motion for discovery & suppression of evidence.					
6-3-76		Filed transcript of record of proceedings. dated 3-30-76					
6-22-76		Dft. Ramirez present (S. Holtzman Atty Present) Trial adjourned to 9/20/76. Same bail cont'd as to Ramirez.....Pierce J.					
8-31-76		Conference held - Trial Adjourned to Nov. 22,1976.....Wyatt J.					
11-12-76		Filed Dfts. Notice of Motion & supporting affdvt. for order dismissing the indictment.					
11-16-76		Filed Dfts. Notice of Motion & supporting affdvt. for order dismissing the indictment...Ret. Sine Die.					
11-17-76		Filed Govt. Request to Charge.					
11-17-76		Filed Govt. Proposed examination of prospective jurors.					
11-22-76		Hearing begun on motion to suppress by dft. Ramirez- Motion denied. Jury trial begun as to dft. Ramirez only....Pierce J.					
11-23-76		Trial Cont'd.					
11-24-76		" "					
11-29-76		" "					
11-30-76		Cont'd					

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

DATE	PROCEEDINGS
12-30-76	Trial Cont'd & concluded - Jury finds deft. Guilty on Count 1, Unable to agree on count 2 - Count 2 Dismissed on dfts. motion with consent of the Court. P.S.I. Ordered - Sentence January 14, 1977 @ 4:30 - Rm. 129....Dft. Remanded.....Pierce J.
1-25-77	Filed CJA 21 Copy 2 - Approving payment to Julie Sayres, 240 W. End Ave., Apt. 8C NYC as counsel for dft. dtd. 12-7-78.....Pierce J.
1-25-77	Filed CJA 21 Copy 5 - Appointing Julie Sayres, 240 W. End Ave., Apt. 8C NYC as counsel for dft. dtd. 12-7-77.....Pierce J.
1-25-77	Filed Dft. Notice of Motion & Affdvt. for order setting aside the jury verdict. Ret. 1-31-77.
1-31-77	Filed Judgment & Commitment (Stuart Holtzman Present) The dft. is hereby committed to the custody of the atty. gen. or his authorized representative for imprisonment for a period of FOUR (4) YEARS on count 1. Pur. to T. 21 U.S. Code, Sec. 841, dft. is placed on Special Parole for a term of THREE (3) YEARS to commence upon expiration of term of imprisonment. Pur. to the provisions of T. 18, Sec. 4205(b)(2), dft. shall become eligible for parole at such time as the Board of Parole may determine.....Pierce J.
2-8-77	Filed Dfts. Notice of Appeal from Judgment dtd. 1-31-77. (mailed notice)
2-8-77	Filed True Copy of J&C with marshals ret. Dft. delivered to Warden, MCC, NY on 1-31-77.
2-17-77	Filed the following papers rec'd from Mag. Sinclair. (Mag. #77-146) Docket Sheet, Entry, & Financial Affdvt.

ARK:kco

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 CRIM. 0296

UNITED STATES OF AMERICA,

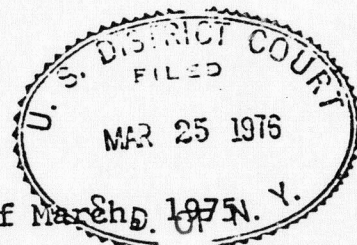
-v-

HERMINIO GUTIERREZ, a/k/a "Cuba,"
and VICTOR RAMIREZ,

Defendants.

INDICTMENT

76 Cr.



The Grand Jury charges:

1. From on or about the 1st day of March, 1975, of N. Y.

and continuously thereafter up to and including the 1st day of October, 1975, in the Southern District of New York, HERMINIO GUTIERREZ, a/k/a "Cuba", and VICTOR RAMIREZ, the defendants, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances, the exact amounts thereof being to the Grand Jury unknown, in violation of Sections 812, 841(a)(1) and 841(b)(1)(a) of Title 21, United States Code.

MICROFILM

MAR 26 1976

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On the 15th day of August, 1975, at approximately 5:30 p.m., the defendant HERMINIO GUTIERREZ, a/k/a "Cuba" met with another individual on Pitt Street, between Delancey and Rivington Streets, at which time GUTIERREZ agreed to sell 4 ounces of heroin to this other individual for \$6,000 and GUTIERREZ told the other individual that the defendant VICTOR RAMIREZ would deliver the heroin.

2. On the 15th day of August, 1975, at approximately 6:10 p.m., the defendants HERMINIO GUTIERREZ, a/k/a "Cuba" and VICTOR RAMIREZ, seated in a brown Cadillas Eldorado, New York

ARI:kco

license number 406 YCO, met with another individual on Pitt Street, between Delancey and Rivington Streets, at which time GUTIERREZ informed the other individual that the transaction would take place at Stanton and Ridge Streets.

3. On the 15th day of August, 1975, at approximately 7:05 p.m., the defendant VICTOR RAMIREZ gave a plastic bag containing 4 ounces of brown rock heroin to another individual, at 195 Stanton Street, and in return, RAMIREZ received \$5,000.

4. On the 15th day of August, 1975, at approximately 7:10 p.m., the defendant VICTOR RAMIREZ drove to the vicinity of Prince and Elizabeth Streets, where he met with the defendant HERMINIO GUTIERREZ, a/k/a "Cuba."

5. On the 20th day of August, 1975, the defendant HERMINIO GUTIERREZ, a/k/a "Cuba" met with another individual in front of 57 Pitt Street, at which time GUTIERREZ received \$1,000.

6. On the 22nd day of August, 1975, the defendant HERMINIO GUTIERREZ, a/k/a "Cuba" met with another individual on Elizabeth Street.

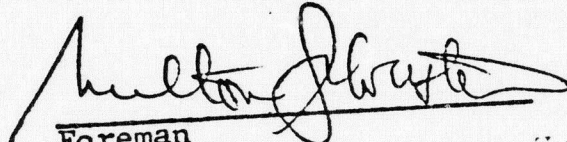
(Title 21, United States Code, Section 846)

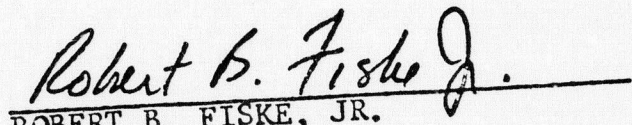
COUNT TWO

The Grand Jury further charges:

On or about the 15th day of August, 1975, in the Southern District of New York, HERMINIO GUTIERREZ, a/k/a "Cuba," and VICTOR RAMIREZ, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 101.49 grams of heroin.

(Title 21, United States Code, Sections 812, 841 (a) (1) and 841(b) (1) (A); Title 18, United States Code, Section 2).


Foreman


ROBERT B. FISKE, JR.
United States Attorney

MAR 3 1976

Bail application hearing held - atty Barbara Lowan present for dept Gutierrez.
atty Stuart Holtzman present for dept Ramirez.
Bail is reduced as follows:

Dept Gutierrez - Bail fixed by Court at \$20,000 PRB sec. by \$5,000 cash and bail limits are limited to S.D.N.Y. Dept to report by telephone to U.S. Attorney's Office weekly until disposition of case.

Dept Ramirez - Bail reduced fixed by Court at \$10,000 PRB signed by one brother + one sister and secured by \$250 cash. Bail limits - Dept restricted to Eastern + Southern District of N.Y. Pierce, J.

April 7, 1976 - Conference held - both depts + their attys present - AUSA present - Trial set for July 6, 1976 at 9:30 - Bail cont'd. Pierce, J.

June 22, 1976 - Dept Gutierrez not present (his atty Barbara Lowan present) Dept Ramirez present with atty S. Holtzman

B/W ordered as to Gutierrez - Bail forfeited - Trial adjourned to 9/20/76 Same bail cont'd as to Ramirez Pierce, J.

August 31, 1976 - Conference held - Trial adjourned to Nov 22, 1976 - B/W remains outstanding as to dept Gutierrez. Pierce, J.

November 22, 1976 - Hearing begun on motion to suppress by dept Ramirez - motion denied - Jury trial begun as to dept Ramirez only.

November 23, 1976 - Trial cont'd

November 24, 1976 - Trial cont'd

November 29, 1976 - Trial cont'd

November 30 - Trial cont'd + concluded - Jury finds dept guilty on count 1 + unable to agree on count 2. Count 2 dismissed on dept's motion with consent of Gov't. PSI ordered - Sentence January 14, 1977 at 4:30 - Rm 129. Dept Remanded Pierce, J.

1/31/77 - Dept Ramirez sentenced to Four (4) years on count 1.

Purs. to T-21, U.S. Code, Sect 841, defendant is placed on 3yr spec. parole. Purs. to provision of T-18 - Sect 9205(b)(2) - Dept should become eligible for parole at such time as Board of Parole may determine. Dept Remanded. Pierce, J.

PIERCE

25 1976 Indictment filed. Grisa J.

30 1976 Deft Gutierrez (Atty. ^{Barbara Ann Roman} ~~per. ~~Strait Holtzman~~~~)

Pleads not guilty. Bail fixed by
Mag cont'd 20,000 ~~per. ~~Strait Holtzman~~~~ ^{cost a surety} 724

deft continued remanded in lieu of
bail.

Deft Ramirez (Atty. ~~per. Strait Holtzman~~)

Pleads not guilty. Bail fixed by Mag

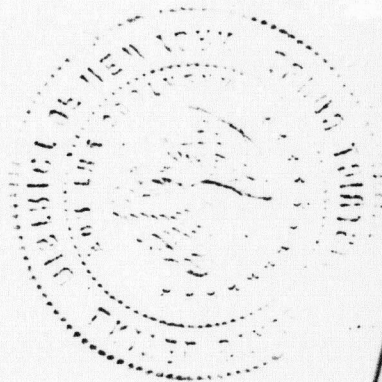
Cont'd 10,000 ~~per. ~~Strait Holtzman~~~~ ^{cost a surety} 724

Continued remanded in lieu of bail

Deft's motions for reduction of bail,

motions denied. Guyon J. MR

(over)



1 lzmch 9

2 CHARGE OF THE COURT

3 Pierce, J.

4
5 THE COURT: Counsel, Madam Forelady and ladies
6 and gentlemen of the jury:

7 First of all, I wish to thank you for your
8 service as jurors in this case. But for your meeting this
9 obligation of citizenship, the administration of justice
10 could not proceed. We recognize that citizens have to
11 make sacrifices in order to serve on juries and we are
12 grateful to you for making those sacrifices and serving
13 in the trial of this case.

14 I also wish to thank the attorneys for their
15 cooperation during the trial. I commend the attorneys for
16 their skillful and their able performance as trial counsel
17 in this case.

18 I ask you, ladies and gentlemen, to give me
19 your attention as you have given your attention throughout
20 the trial, in order that you might understand the principles
21 of law which are applicable in this case.

22 First, I wish to point out some general
23 principles as to your duty, as to what you may and may
24 not consider during your deliberations.

25 It is my function to instruct you as to the law

1 lzmch 10

2 which applies in the case and it is your duty to accept
3 the law as I state it to you, and it is your duty to apply
4 the law to the facts as you find those facts to be during
5 your deliberations upon the evidence in this case.

6 I ask you not to single out any one instruction alone as
7 stating the law, but, rather, to consider the instructions
8 as a whole and the logical result of your application of
9 the law to the facts as you find those facts to be from the
10 evidence should be a verdict, a verdict of guilty or not
11 guilty.

12 Now, you are the sole and exclusive judges of
13 the facts in this case. You are the only ones to pass upon
14 the weight of the evidence. You are the only ones to
15 determine the credibility of the witnesses. You are the
16 ones who must resolve any conflicts that exist in the
17 evidence and you must draw such reasonable inferences
18 as may be warranted by the evidence in this case.

19 With respect to any matters of fact, it is
20 your recollection and yours alone which governs. Anything
21 the attorney for the Government or the attorney for the
22 defendant may have said with respect to any matters in
23 evidence or as to any factual matters is not to be substituted
24 for your own independent recollection of the evidence or
25 the facts in this case, and the same thing is true with

1 lzmch 11

2 respect to anything I may say with respect to any matters
3 in evidence or as to any factual matters. It is your
4 recollection which matters, not mine.

5 You are not to assume that I have any opinion
6 as to whether or not the defendant is guilty or not
7 guilty or as to the truth or falsity of the charges
8 asserted in the indictment. The fact that I have asked
9 questions from time to time, granted or denied motions,
10 during the course of the trial is not to be taken by you
11 as any indication that the defendant is believed by the
12 Court to be either guilty or not guilty.

13 Further, the attorneys have the right on the
14 offer of certain evidence to press legal objections, and
15 in doing so they are simply doing their duty as lawyers.

16 In your deliberations to determine the facts
17 and whether the Government has established the elements
18 of the crimes charged, and you will hear more about those
19 elements later, you are to consider solely the testimony
20 which you have heard from the witnesses, any stipulations
21 of fact the attorneys have agreed upon, and the exhibits
22 which have actually been received in evidence, and even any
23 lack of material evidence, but nothing else.

24 I told you earlier that certain evidence was
25 being received subject to connection. I have also told you

1 lzmch 12

2 that I found the evidence to be connected, and thus that
3 it might be considered by you along with all the other
4 evidence in the case. Please remember that this ruling
5 does not, in any way, represent a finding by this Court
6 as to what the facts are. That determination must be made
7 by you, the jury. I have simply ruled that the evidence
8 in question may now be considered by you as you perform your
9 function of deciding what the facts are from the evidence.

10 In the determination of whether a defendant is
11 guilty or not guilty of crimes charged, you must remember
12 that guilt is personal and that the determination of
13 whether a defendant is guilty or not guilty must be
14 determined solely on the evidence admitted as to the defendant
15 you are considering. Here that is Victor Ramirez.

16 As you approach the performance of your
17 function in this case, that is, the determination of
18 whether the defendant is guilty or not guilty, please
19 remember that it is your duty to weigh the evidence calmly
20 and dispassionately and without sympathy or prejudice for or
21 against either party.

22 The fact that the Government is a party here
23 or that the prosecution occurs in the name of the United
24 States of America entitles it to no greater consideration
25 and to no less consideration than that accorded to any other

1 lzmch 13

2 party. All parties, government and individuals alike,
3 stand equal before the law.

4 The defendant on trial here has pleaded not
5 guilty to the two counts with which he is charged, and
6 consequently, if the defendant is to be convicted, the
7 Government has the burden of proving each and every
8 element of the crimes charged beyond a reasonable doubt.
9 The burden of proving guilt beyond a reasonable doubt
10 never shifts. It remains upon the Government throughout
11 the trial.

12 The law never imposes upon a defendant in a
13 criminal case the burden of calling any witnesses of
14 producing any evidence. You may draw no unreasonable
15 inference against the defendant because he did not take the
16 stand and testify. In addition, you may not speculate
17 as to why the defendant chose not to testify nor may you
18 speculate as to what the defendant might have stated had
19 he chosen to testify.

20 In every criminal case there is a constitutional
21 rule which every defendant has the right to rely on.
22 It is the rule that no defendant is compelled to take the
23 witness stand. It is the prosecution which must prove a
24 defendant guilty as charged beyond a reasonable doubt,
25 and the defendant is not required to disprove anything.

1 lzmch 14

2 He is not required to establish his lack of guilt.

3 Also, a defendant has no obligation to call
4 any witnesses on his behalf or to offer any evidence
5 whatsoever. In short, it is up to the Government to
6 prove beyond a reasonable doubt every element of the
7 crimes charged in the indictment.

8 The defendant is presumed to be not guilty
9 of the accusations contained in the indictment, and this
10 presumption continues throughout the trial and even during
11 the course of your deliberations in the jury room. So, the
12 presumption of innocence is sufficient to acquit a defendant
13 of a crime charged, unless it is overcome by evidence that
14 satisfies your minds beyond a reasonable doubt of the
15 defendant's guilt. Unless you are so satisfied, it is your
16 sworn obligation to find the defendant not guilty. If
17 you are so satisfied, it is your sworn obligation to find
18 the defendant guilty.

19 So, the question arises: What is a reasonable
20 doubt?

21 It is a doubt which a reasonable person has
22 after carefully weighing all the evidence. It is the
23 kind of doubt which would make you hesitate to act in the
24 most important affairs of your own lives. Reasonable
25 doubt is doubt which appeals to your reason, your judgment,

1 lzmch 15

2 your common sense and your experience.

3 It is not caprice or whim or speculation.
4 It is not sympathy. It is not an excuse to avoid the
5 performance of an unpleasant duty.

6 If, after a fair and impartial consideration
7 of all of the evidence or lack of evidence, you can
8 honestly say that you do not have an abiding belief as to
9 the defendant's guilt, then you have a reasonable doubt
10 and it is your duty to acquit.

11 On the other hand, if, after a fair and
12 impartial consideration of all of the evidence, you can
13 honestly say that you do have an abiding belief as to the
14 defendant's guilt, then you have no reasonable doubt and
15 it is your duty to convict.

16 A reasonable doubt does not mean positive
17 certainty beyond all possible doubt. The law in a criminal
18 case is that it is sufficient if the guilt of a defendant
19 is established beyond a reasonable doubt, not beyond all
20 possible doubt.

21 From time to time you may have heard reference
22 made to direct evidence and to circumstantial evidence.
23 Let me briefly explain the difference between the two.

24 Direct evidence is where a witness testifies to
25 what he or she saw, heard or observed, what the witness

1 lzmch 16

2 knows of his or her own knowledge, something which comes
3 to that person by virtue of his or her senses. That is
4 direct evidence.

5 Circumstantial evidence is evidence of
6 facts and circumstances from which a person may infer
7 connected facts which reasonably follow in the common
8 experience of mankind.

9 To state it somewhat differently, circumstantial
10 evidence is a fact or a series of facts in evidence which
11 have a logical tendency to lead the mind to a conclusion
12 that another fact exists, even though there is no direct
13 evidence to that effect.

14 Let me give you one brief example.

15 If, when you filed out of the courtroom during
16 a recess, you could see that it was raining outside
17 and that all of the windows in the courtroom were closed
18 and you saw that all of the window sills beneath the
19 windows were dry, and then, after a ten or fifteen-minute
20 recess, you come back into the courtroom and you find that
21 all of the windows are still closed and you look out and
22 you see that it is still raining, if, upon your return
23 to the courtroom, you saw water upon the window sills, you
24 could conclude that someone had opened the windows and then
25 rain had come into the courtroom and fallen upon the window

1 lzmch 17

2 sills.

3 Now, you would arrive at such a conclusion
4 from circumstantial evidence. In other words, you would
5 infer on the basis of reason and experience and common
6 sense from one or more established facts the existence of
7 some further fact.

8 A conviction may not rest upon suspicious
9 circumstances alone. However, circumstantial evidence, if
10 believed, is of no less value than direct evidence, for,
11 in either case, you must be convinced beyond a reasonable
12 doubt of the guilt of the defendant.

13 There are times when different inferences may
14 be drawn from the same facts, whether proved by direct
15 or by circumstantial evidence. The Government asks you
16 to draw one set of inferences; the defendant asks you to
17 draw another. It is for you and you alone to decide what
18 reasonable inferences you choose to draw from the evidence
19 in this case and, indeed, it is your duty to determine the
20 reasonable inferences to be drawn from the facts as you
21 find those facts to be from the evidence, but you may not
22 indulge in guesswork or speculation.

23 There are a number of factors which are not
24 evidence in this case and which you may not, under any
25 circumstances, consider during your deliberations.

1 lzmch 18

2 First, if during the course of the trial a
3 question was asked and an objection was made and I sustained
4 the objection, then you are to disregard the question and
5 any alleged facts contained in the question. If there was
6 an answer to the question, then you are to disregard the
7 answer.

8 If I ruled that an answer be stricken from the
9 record, you are to disregard the answer and the question
10 in your deliberations. They are not evidence and therefore
11 cannot be considered by you in any respect.

12 I told you at the beginning of this trial
13 that an indictment is not evidence. It is simply a pro-
14 cedure by which persons accused by a grand jury of crimes
15 are brought to trial, and whether the person accused is
16 guilty or not guilty of the crimes charged is determined by
17 a trial jury, such as you.

18 In this case there is another person named
19 in the indictment who is not on trial here. You are not to
20 consider his absence as evidence of any kind for any purpose.
21 This absence may be due to a variety of reasons and the
22 disposition of the indictment with respect to him is of no
23 concern to you as jurors. You are not to speculate as to
24 the reason why he is not on trial here.

25 You have heard testimony in this case that

1 lzmch 19

2 the defendant, Victor Ramirez, made certain statements to
3 Rene Rivera, Raymond Valentine and Benito Cruz. You may
4 find these statements to have been admissions on the part
5 of the defendant Ramirez. Should you make such a finding,
6 such admissions constitute weighty evidence against the
7 party making them and you are entitled to give great weight
8 to any such admissions.

9 You have heard evidence which may lead you
10 to believe that the defendant was involved in alleged
11 incidents similar to those charged in the indictment in
12 this case. You will recall that there was testimony by
13 Raymond Valentine and by the witness Cruz, and they
14 testified to certain alleged drug transactions. To the extent
15 that any of those alleged drug transactions may be found
16 by you to have preceded in time the period set forth in
17 the indictment here, and in Count 1 that period is from on
18 or about October 1, 1975 until -- that is, up to and
19 including the 1st day of October 1975, to the extent
20 that you find any such transaction occurred and occurred
21 prior to that period, you may consider it only as background
22 information and for no other purpose.

23 To the extent that they involve the alleged
24 coconspirator Herminio Gutierrez but not the defendant
25 Victor Ramirez but yet fall within the period charged in

1 lzmch 20

2 the indictment in Count 1, the conspiracy charge, you may
3 consider this evidence as bearing upon the question of
4 whether or not the defendant Victor Ramirez is guilty of
5 Count 1, that is, the conspiracy charge.

6 To the extent that any of that evidence
7 bears upon alleged conversation or transactions with the
8 defendant Victor Ramirez during the period set forth, from
9 on or about March 1, 1975, which is the beginning period
10 of the conspiracy charge, to August 15, 1975, which is
11 the date set forth in Count 2, the so-called substantive
12 charge about which I will have more to say later, you may
13 consider the evidence as bearing upon the question of whether
14 the defendant Ramirez is guilty of Count 2.

15 You may consider it, however, in only one
16 respect, and that is as bearing upon the question of the
17 defendant Ramirez' motive, intent and knowledge. You may
18 consider it in no other respect with regard to Count 2.

19 Now, certain of the evidence in this trial was
20 admitted by way of tape recordings of certain alleged
21 conversations. During the course of this trial transcripts
22 of the tape recordings were received in evidence. By
23 agreement of both counsel, the tapes were not played to you
24 since they are said to be mostly in Spanish. Transcripts,
25 which are normally only made available to a jury to aid in

1 lzmch 21

2 your understanding or listening to tapes, in this instance
3 have been received in evidence and they are available to
4 you upon request.

5 There is a dispute between the parties as to
6 whose voices are on the tapes, and also as to what was
7 said by each speaker, and as to whether the transcripts
8 set forth as fully as possible all that can be heard on
9 the tapes and understood from listening to the tapes.

10 If you have questions in your minds as to
11 any of these matters, the tapes are available to you to
12 be played; both the tapes and the transcripts are in
13 evidence and the tapes may be played to you even though
14 they are in Spanish. Should it appear to you that the
15 transcripts vary from the tapes in any respect, it will be
16 your hearing of the tapes that governs. You, the jury,
17 must determine as triers of the facts what was said in the
18 conversations for which tape recordings and transcripts
19 were offered into evidence.

20 Now, of course, on those transcripts you will
21 find both Spanish, which purports to be that which was
22 taken from the tapes, and then you will find the translation
23 into English -- at least it purports to be the translation
24 from Spanish into English. You will have to make judgments
25 about all of these matters, keeping in mind what testimony

1 lzmch 22

2 has been presented and what issues have been raised here.

3 You are the sole judges of the credibility of
4 witnesses and of the weight their testimony deserves.

5 You know that there is no automatic way to decide who is
6 telling the truth and who is not. Credibility can be
7 equated with believability. If a witness is credible,
8 we say that he or she is believable.

9 You should carefully scrutinize all the
10 testimony given, both on direct and cross-examination
11 and any other examination, and the circumstances under
12 which each witness has testified, and you should consider
13 every matter in evidence which tends to show whether a
14 witness is worthy of belief. Consider the witness' ability
15 to observe the matters about which the witness has testified
16 and whether the witness impresses you as having had an
17 accurate recollection on such matters.

18 A witness may be discredited or impeached
19 by contradictory evidence or by evidence that at other times
20 the witness made statements inconsistent with the witness'
21 present testimony. If you believe that any witness has been
22 impeached and thus discredited, it is your exclusive
23 province to give the testimony of that witness such cred-
24 ibility, if any, as you think it deserves. Evidence that
25 a witness has been convicted in the past of certain crimes

1 lzmch 23

2 may be considered by you in determining that witness'
3 credibility. By this I mean that you may consider the
4 prior convictions in determining that witness' worthiness
5 of belief.

6 When judging credibility, consider any
7 relation any witness may bear to any side of the case.
8 Consider the manner in which each witness might be affected
9 by the verdict, and the extent to which, if at all, each
10 witness is either supported or contradicted by other
11 evidence in the case. Consider a witness' interest and
12 motive, if any, to testify falsely.

13 If you find that any witness has wilfully
14 testified falsely as to any material matter, you may reject
15 the entire testimony of that witness or you may accept
16 such portion of it as you believe to be true.

17 There has been testimony with respect to the
18 use of persons sometimes referred to as informants or
19 informers. Such services are availed by government agents
20 at times as an aid to law enforcement. The law permits
21 the use of informers, provided the rights of a defendant
22 are not violated. Whether or not you approve of the use of
23 an informant in an effort to detect law violations is not
24 to enter into your deliberations.

25 With reference to this, I also instruct you

1 lzmch 24

2 that the testimony of an informer must be examined and
3 weighed by you with great care.

4 If it is especially within the power of the
5 prosecution or defense to produce a witness who could
6 give material testimony on an issue or to produce other
7 evidence, the failure to call such witness may give rise
8 to an inference that the evidence would be unfavorable.
9 You cannot draw any such inference with regard to a
10 witness or exhibit that is equally available to both
11 parties, or where the witness' testimony would be merely
12 cumulative, and you may draw no inference of any kind as
13 to either party where a witness is not available to either
14 side.

15 The attorneys in this case have stipulated
16 that Rene Rivera is not available to either side, and it
17 has been stated to you that the alleged coconspirator,
18 Herminio Gutierrez, is a fugitive. I remind you again
19 that a defendant is under no obligation to offer any
20 evidence whatsoever.

21 In regard to all witnesses, the ultimate
22 question, ladies and gentlemen, the ultimate question for
23 you to decide in passing on the credibility of a witness
24 is did the witness tell the truth before you. It is for
25 you to say whether a witness' testimony, at this trial was

1 lzmch 25

2 truthful or untruthful in whole or in part.

3 This completes my general instruction with regard
4 to what your duty and function is and with regard to what
5 you may and may not consider in your deliberation.

6 I am going to turn now to a discussion of the
7 particular charges against the defendant and instruct you
8 as to what essential elements the Government must prove
9 beyond a reasonable doubt in order to sustain the charges
10 against the defendant.

11 Now, would you please stand in place for
12 a few minutes and let the blood circulate.

13 (Pause)

14 THE COURT: The defendant in this case is
15 named in both counts in an indictment which charges
16 violations of federal drug laws.

17 In the first count the defendant is charged
18 with conspiring to distribute and to possess with the
19 intent to distribute a narcotic controlled substance, to
20 with, heroin.

21 In the second count the defendant is charged
22 with committing what we call a substantive violation of
23 federal law, which makes it unlawful to possess a narcotic
24 drug controlled substance with the intent to distribute.

25 Each count charges a separate crime. Each

1 lzmch 26

2 count must be considered by you separately, and with
3 reference to each count, in determining whether the
4 defendant Ramirez is guilty or not guilty, you are to
5 consider the evidence presented against him.

6 The essential elements of the two counts are
7 different, so we will consider each separately. Fortunately,
8 this is a two-count indictment, unlike many indictments
9 we have here which involve numerous counts. It means that
10 the charge, at least from the judge's point of view and the
11 lawyers' point of view, is not unduly burdensome.

12 You may find that you have some difficulty
13 recalling what I have read to you by way of instruction
14 and, if that is true, you may ask for a rereading of any
15 portion of this charge.

16 Further, you will find that I tend to say
17 whatever it is I'm telling you more than once, so just pay
18 careful attention.

19 I think it will be somewhat simpler if we
20 discussed the second count at the outset. That's what we
21 call the substantive count. The first count was the
22 conspiracy count. We will take that later.

23 Count 2 reads:

24 "The grand jury further charges:

25 "On or about the 15th day of August, 1975, in

1 lzmch 27

2 the Southern District of New York, Victor Ramirez, the
3 defendant, unlawfully, intentionally and knowingly did
4 distribute and possess with intent to distribute a
5 Schedule I narcotic drug controlled substance, to wit,
6 approximately 101.49 grams of heroin, in violation of
7 federal law."

8 I instruct you now that, under the laws of the
9 United States, heroin or heroin hydrochloride, whatever
10 you want to call it, is a Schedule 1 narcotic drug controlled
11 substance, and also that Manhattan, the Island of
12 Manhattan, is within the Southern District of New York.

13 Before you may find the defendant Ramirez
14 guilty of this substantive crime, you must first find that
15 each of the following elements has been established beyond
16 a reasonable doubt as to the defendant Ramirez:

17 1. That on or about the date charged,
18 August 15, 1975, the defendant possessed a narcotic drug
19 controlled substance with intent to distribute it;

20 2. That he did so unlawfully, intentionally
21 and knowingly; and

22 3. That the substance in Government's

23 Exhibit 4 is, in fact, heroin.

24 You will note that the first element of the
25 offense reads, "possessed with intent to distribute" the

1 lzmch 28

2 drug. The word "possessed" is used in its common everyday
3 sense; to possess something is to exercise dominion and
4 control over it, but there can be two types of possession.
5 There is actual possession. That is where an individual
6 has a personal, manual or physical control of something.
7 And then there is constructive possession. That is where
8 a person has the power to control something although it is
9 in the physical possession of somebody else.

10 Thus, a person who is sufficiently associated
11 with the persons having physical control of whatever the
12 thing is so that he is able, without difficulty, to cause
13 the thing to be produced, in this case a drug, for a
14 customer can be said to have dominion and control over
15 the drugs and therefore possession.

16 On the other hand, the mere presence at the
17 scene where the drug is of a person who may know that
18 another person has such possession but who does not have a
19 working relationship with that person which would enable
20 him to assure delivery of the drug lacks dominion and control
21 and does not have possession.

22 If you find that the defendant Ramirez
23 possessed the heroin as charged in this case, before the
24 first element is satisfied you must also find that it was
25 possessed with the intent or purpose to distribute it,

1 lzmch 29

2 that is, to transfer it, to deliver it, to pass it on, and
3 not to use it for himself.

4 The word "intent" refers to a person's state
5 of mind. Ordinarily, intent cannot be demonstrated
6 directly since the thought process is not readily
7 susceptible to proof in court. You may, however, infer
8 a particular defendant's knowledge and intent from the
9 circumstances and the facts surrounding whatever acts you
10 find occurred.

11 To sum up the first element, it is to exercise
12 dominion and control over the heroin with a deliberate
13 plan to pass it on or deliver it.

14 The second element is that the defendant
15 unlawfully, intentionally and knowingly possessed the
16 heroin with the intent to distribute it. "Unlawfully,"
17 of course, means contrary to law. It is not necessary that
18 a defendant know that he was violating any particular
19 statute. Rather, it is sufficient if you are convinced
20 that he was aware of the unlawful nature of his act.

21 An act is done intentionally if it is done
22 wilfully and deliberately. An act is done knowingly

23 if it is done voluntarily and purposefully.

24 Thus, before you can find element 2 satisfied,

25 the Government must meet the burden of establishing that

1 lzmch 30

2 the defendant knew what he was doing and that he did it
3 deliberately and voluntarily and with the awareness that
4 he was breaking the law, and not because of mistake or
5 accident or for some other inadvertent reason.

6 As the third element, you must be satisfied
7 that the substance which was possessed in this case is
8 heroin. There is testimony of the Government chemist
9 by way of stipulation that Government's Exhibit 4 is heroin.
10 However, this is an element of the crime charged and
11 hence you must find it would have been proved.

12 AGain, before you may find the defendant
13 guilty of the substantive crime, you must first find
14 that each of the three elements I have just explained has
15 been established beyond a reasonable doubt. I am going
16 to read that count to you again:

17 "The grand jury charges:

18 "On or about the 15th day of August, 1975, in
19 the Southern District of New York, Victor Ramirez, the
20 defendant, unlawfully, intentionally and knowingly did
21 distribute and possess with intent to distribute a
22 Schedule I narcotic drug controlled substance, to wit,
23 approximately 101.49 grams of heroin."

24 Should you find that the defendant himself
25 did not distribute heroin or possess heroin with the intent

1 lzmch 31

2 to distribute it, you must then consider whether he aided
3 and abetted another to commit that offense. Although the
4 indictment charges distribution or possession with intent
5 to distribute, it is federal law that one charged with
6 violating a statute is guilty if the jury finds that he
7 violated the statute or that he aided and abetted another
8 person in violating the statute. The section which is
9 applicable reads, in part, as follows:

10 Whoever commits an offense against the
11 United States or aids or abets its commission is punishable
12 as a principal.

13 In other words, a person who aids and abets
14 another to commit an offense is just as guilty of that
15 offense as if he committed it himself.

16 Accordingly, you may find the defendant guilty
17 of the offense charged in the indictment here if you find
18 beyond a reasonable doubt that any person the defendant
19 met with distributed heroin or possessed it with an intent
20 to distribute it, and that the defendant aided and abetted
21 that person.

22 In order to aid and abet another to commit a
23 crime, it is necessary that the accused wilfully associate
24 himself in some way with the criminal venture, and wilfully
25 participate in it as he would in something he wishes to bring

1 lzmch32

2 about, that is to say, that he unlawfully, wilfully sought
3 by some act or omission of his own to make the criminal
4 venture succeed.

5 Therefore, if you find that the defendant
6 Ramirez wilfully associated himself with a criminal venture
7 as charged here in this case, to wit, the drug transaction,
8 that he wilfully participated in it as something he wished
9 to bring about, and that he wilfully sought by some act
10 or omission of his own to make the drug transaction succeed,
11 then you must find him guilty of aiding and abetting.

12 An act or omission is wilfully done if it is
13 done voluntarily and intentionally and with specific intent
14 to do something which the law forbids, or with a specific
15 intent to fail to do something the law requires to be done,
16 that is to say, with a bad purpose either to disobey or to
17 disregard the law.

18 You may not find the defendant guilty of aiding
19 and abetting unless you find beyond a reasonable doubt
20 that every element of the offense of illegally distributing
21 or possessing with intent to distribute heroin, as defined
22 in these instructions, was committed by some person or
23 persons and that the defendant knowingly and wilfully
24 participated in its commission.

25 Let's move on to Count 1, the conspiracy count.

1 lzmch 33

2 The indictment charges that the defendant
3 conspired, along with alleged coconspirators, to distribute
4 and possess with intent to distribute a narcotic drug
5 controlled substance, to wit, heroin. I must read that
6 to you.

7 From on or about the 1st day of March, 1975,
8 and continuously thereafter up to and including the 1st
9 day of October, 1975, in the Southern District of New York,
10 Herminio Gutierrez, also known as Cuba, and Victor Ramirez,
11 the defendants, and others to the grand jury unknown, unlaw-
12 fully, intentionally and knowingly combined, conspired,
13 confederated and agreed together and with each other to
14 violate sections -- certain named sections of the federal
15 law.

16 2. It was part of said conspiracy that the
17 said defendants unlawfully, intentionally and knowingly
18 would distribute and possess with intent to distribute
19 Schedule I narcotic drug controlled substances, the exact
20 amounts thereof being to the grand jury unknown, in
21 violation of, again, certain named sections of the United
22 States Code.

23 And then there are some six overt acts which
24 are listed under the caption "Overt Acts." I am not going
25 to read those to you just yet.

1 lzmch 34

2 The defendant thus is charged with conspiring
3 to violate those federal laws which list heroin as a
4 narcotic drug controlled substance among the narcotic drug
5 controlled substances, and another section which makes it
6 unlawful for any person to knowingly and intentionally
7 distribute heroin or to possess heroin with the intent to
8 distribute.

9 Before you may convict the defendant under this
10 conspiracy charge, you must find that the Government has
11 proven beyond a reasonable doubt the following three elements
12 of the crime charged:

13 First, that a single overall conspiracy as
14 charged in the indictment existed. The Government charges
15 that the coconspirators in this case with defendant
16 Ramirez, Herminio Gutierrez, also known as Cuba, and one
17 Fernando Gallardo.

18 Second, that the defendant was a wilful, knowing
19 member of that conspiracy.

20 Third, that at least one of the overt acts
21 alleged in the indictment was committed by a member of the
22 conspiracy.

23 As to the first element, the existence of the
24 conspiracy charged, a conspiracy is defined as an agreement
25 between two or more persons to accomplish some unlawful

1
2 purpose. It has been referred to somewhat loosely as a
3 partnership in crime. The gist of th4 crime is the agreement
4 itself to violate the law. Whether or not the alleged
5 conspirators ever accomplished what it is alleged they
6 conspired to do is not material to the question of whether
7 they are guilty or not guilty of the crime of conspiracy.

8 It is not necessary in order to establish
9 the existence of a conspiracy that there be evidence that
10 the persons involved entered into a formal agreement.
11 It is sufficient that two or more persons in any manner,
12 through any means, came to a common understanding to accom-
13 plish certain unlawful goals.

14 It is not required that you find that all of
15 those who are alleged to be coconspirators joined in the
16 conspiracy in order for you to find that a conspiracy
17 existed.

18 In this case, if you find that the conspiracy
19 charged did exist, you must be satisfied that sometime
20 between March 1, 1975 and October 1, 1975 an agreement
21 existed between any person named as an alleged coconspirator
22 and the defendant.

23 You must be further satisfied that it was part
24 of the agreement to accomplish the aims set forth in the
25 conspiracy count, that is, to distribute or to possess with

2 the intent to distribute a controlled substance, to wit,
3 heroin.

4 In this case you must find beyond a reasonable
5 doubt that the defendant conspired with someone to possess
6 and to distribute, that is, to possess with intent to
7 distribute a drug controlled substance known as heroin.

8 I instruct you, as a matter of law, that heroin
9 is a Schedule I narcotic drug controlled substance as
10 defined by the statute under which the defendant is charged.
11 However, you must still find beyond a reasonable doubt
12 that the substance the defendant allegedly conspired to
13 possess with the intent to distribute was in fact heroin.

14 It is not necessary that the Government prove
15 that the conspiracy existed throughout the entire period
16 alleged in the indictment. It is sufficient that the
17 Government proves that during the time charged a conspiracy
18 arose and existed between the defendant and a coconspirator.

19 In determining whether an unlawful conspiracy
20 existed, you are to consider the evidence as to acts and
21 conduct of each of the persons the Government alleges were
22 coconspirators. If the proof convinces you beyond a reason-
23 able doubt that the minds of at least two of the alleged
24 coconspirators met so as to bring about the deliberate

25 agreement to do the acts set forth as the aims of the

1 lzmch 37

2 agreement, that is sufficient proof of the existence
3 of a conspiracy and this would satisfy the first element
4 of the crime.

5 The second element the Government must prove
6 is that the defendant was a knowing and wilful member of
7 the conspiracy, that is, that the defendant was a party to
8 the conspiracy. This exists in the mind. Since it is
9 not possible to look into someone's mind for the purpose
10 of seeing what went on, the only way you have for arriving
11 at a decision on the question of knowledge is for you to
12 take into consideration all of the facts and circumstances
13 shown by the evidence, and to determine from all such facts
14 and circumstances where the requisite knowledge was present
15 at the time in question.

16 Direct proof of knowledge is not necessary.
17 Knowledge may be inferred from all the surrounding circum-
18 stances.

19 An act is done knowingly if it is done volun-
20 tarily and purposely and not because of mistake, accident,
21 mere negligence or for other innocent reasons. An act is
22 done wilfully if it is done knowingly and deliberately

23 with the purpose of disobeying or disregarding the law.

24 In this regard, you must be satisfied beyond
25 a reasonable doubt that the defendant Ramirez did wilfully

1 lzmch 38

2 and knowingly join the conspiracy, aware of its unlawful
3 aims. It is not necessary that a person be fully informed
4 as to the details or the scope of a conspiracy in order for
5 you to find that he was a knowing and wilful member of the
6 conspiracy. He is equally culpable with the other member
7 or members even though his participation may be more limited
8 than that of other coconspirators.

9 However, the mere fact that a person may be
10 seen with an alleged coconspirator is not in itself enough to
11 make him a coconspirator. Before you can find that the
12 defendant is a member of a conspiracy charged, you must find
13 beyond a reasonable doubt that he wilfully joined the
14 conspiracy, aware of its aims.

15 When people enter into a conspiracy, they
16 become agents for one another in carrying out the conspiracy.
17 If you find that a conspiracy existed and that a particular
18 person was a knowing and wilful party to it, then that
19 person's acts and declarations which are performed during
20 the duration of the conspiracy and in furtherance of its
21 aims are binding upon any other person whom you find was also
22 a knowing and wilful member of the same conspiracy, just as
23 though he had performed the acts and made the declarations
24 himself, and this is so even if the person doesn't know
25 about the act or statement of the other person and is not

1 lzmch 39

2 there when such act or declaration was done or made.

3 Thus, if you find that the defendant is a
4 coconspirator, then, however limited his role in furtherance
5 of the aims of the conspiracy may have been, he is respon-
6 sible for all that was done in furtherance of the conspiracy
7 by any other member of the conspiracy.

8 The third element of the charge of conspiracy
9 is the overt act element.

10 An overt act need not be in itself a criminal
11 act. It is one of the elements of a conspiracy charged
12 because it demonstrates, if found to exist, that the
13 conspirators have gone beyond the stage of merely thinking
14 about an illegal goal. It can be any act, such as, for
15 example, a meeting, as long as it is an act performed in
16 furtherance of the conspiracy which is charged.

17 The Government need not prove that all of the
18 overt acts alleged in the indictment were performed. It is
19 sufficient if it proves that one of the acts was performed
20 in the Southern District of New York, and that it was in
21 furtherance of the conspiracy charged, and that it occurred
22 during the period of the conspiracy as charged.

23 The overt acts charged here are, and I will
24 read them to you:

25 In pursuance of the said conspiracy and to

1 lzmch 40

2 effect the objects thereof, the following overt acts were
3 committed in the Southern District of New York:

4 1. On the 15th day of August, 1975, at
5 approximately 5:30 p.m., the alleged coconspirator Herminio
6 Gutierrez, also known as Cuba, met with another
7 individual on Pitt Street between Delancey and Rivington
8 Streets, at which time Gutierrez agreed to sell 4 ounces
9 of heroin to this other individual for \$6,000, and
10 Gutierrez told the other individual that the defendant
11 Victor Ramirez would deliver the heroin.

12 2. On the 15th day of August, 1975, at approxi-
13 mately 6:10 p.m., the alleged coconspirator Herminio
14 Gutierrez, also known as Cuba, and the defendant Victor
15 Ramirez, seated in a brown Cadillac El Dorado, New York
16 license number 406 YCO, met with another individual on Pitt
17 Street between Delancey and Rivington Streets, at which time
18 Gutierrez informed the other individual that the transaction
19 would take place at Stanton and Ridge Streets.

20 3. On the 15th day of August, 1975, at approxi-
21 mately 7:05 p.m., the defendant Victor Ramirez gave a plastic
22 bag containing 4 ounces of brown rock heroin to another
23 individual at 195 Stanton Street, and in return Ramirez
24 received \$5,000.

25 On the 15th day of August, 1975, at approxi-

1 lzmch 41

2 ately 7:10 p.m., the defendant Victor Ramirez drove to
3 the vicinity of Prince and Elizabeth Streets where he met
4 with the alleged coconspirator Herminio Gutierrez, also
5 known as Cuba.

6 5. On the 20th day of August, 1975, the
7 alleged coconspirator Herminio Gutierrez, also known as
8 Cuba, met with another individual in front of 57 Pitt
9 Street, at which time Gutierrez received \$1,000.

10 6. On the 22nd day of August, 1975, the
11 alleged coconspirator Herminio Gutierrez, also known as
12 Cuba, met with another individual on Elizabeth Street.

13 If you determine that the conspiracy charged
14 existed, it is not necessary for the Government to prove
15 that the defendant committed or participated in a particular
16 overt act, since, as I told you a moment ago, the acts of
17 any member of the conspiracy, done in furtherance of the
18 conspiracy, become the acts of all other members of the
19 conspiracy.

20 I instruct you as a matter of law that the
21 Borough of Manhattan in New York City is in the Southern
22 District of New York, where the Government alleges certain
23 of these acts occurred. However, you still must find that
24 one of the alleged overt acts occurred and that it occurred
25 in the Southern District of New York.

1 lzmch 42

2 To conclude the conspiracy charge, if, upon
3 all the evidence that you believe and consider relevant,
4 you are satisfied that the Government has proven beyond
5 a reasonable doubt each of the three elements of the crime
6 of conspiracy, you will return a verdict of guilty. If you
7 are not so satisfied, you will return a verdict of not
8 guilty.

9 It is not necessary that the Government prove
10 that the conspiracy existed throughout the entire period
11 alleged in the indictment. It is sufficient if it proves
12 that the conspiracy existed for a substantial part of that
13 period.

14 This completes that portion of the charge with
15 respect to the essential elements. I remind you again
16 that the defendant on trial here has the right to separate
17 personal consideration and that you have the duty to give
18 it to him with respect to each crime that the defendant is
19 charged with here. You must determine whether or not the
20 Government has proved each and every element beyond a
21 reasonable doubt. If you find that the Government has
22 failed to prove any element of any crime charged against

23 the defendant beyond a reasonable doubt, then it is
24 your sworn duty to return a verdict of not guilty as to
25 the defendant as to that count. If you find that the

1 lzmch 43

2 Government has met its burden of proving each and every
3 element of the crimes charged, then it is your sworn duty
4 to return a verdict of guilty as to that count.

5 The fact that you find the defendant guilty
6 or not guilty as to one of the offenses charged should
7 not control your verdict as to the other offense charged.

8 You are not to speculate in any way about any
9 sentence which might be meted out should you return a verdict
10 of guilty. It is the function of the jury to deliberate
11 and determine whether a defendant is guilty or not guilty
12 on the basis of the evidence and the instructions given by
13 the Court. It is the function of the judge to determine
14 the disposition of the case thereafter.

15 Now, the most important part of this case is
16 the part which you, as jurors, are about to play, because
17 it is you who will have to determine whether the defendant
18 is guilty or not guilty of the offenses charged. I know
19 you will try the issues that have been presented to you
20 in accordance with the oath which you took as jurors.

21 In that oath you will recall that you promised
22 that you would well and truly try the issues joined in
23 this case and a true verdict render. If you follow that
24 oath and try the issues without confusing your thinking
25 with emotions, you will arrive at a just verdict.

1 lzmch 44

2 As you deliberate, please be careful to listen
3 to the opinions of other jurors, as well as to ask for
4 an opportunity to express your own views. No one juror
5 holds the center of the stage in the jury room, and no one
6 juror controls or monopolizes deliberations. You must all
7 express your views and exchange views and, if you become
8 convinced that your original view was wrong with respect
9 to any matter, don't be afraid to change your vote because
10 of pride in your original opinion or in reaction to the
11 stubbornness of another person.

12 On the other hand, do not surrender your honest
13 belief solely because of the opinion of your fellow jurors
14 or because you are outnumbered.

15 You understand that, in a criminal case in this
16 court, the verdict as to each count must be unanimous,
17 that is, it must be joined in by each and every one of you.
18 The form of the verdict is either guilty or not guilty on
19 each count of the indictment, and there are only two counts.

20 During your deliberations, you may send for any
21 exhibits in evidence that you may desire to review, whether
22 they are Government's exhibits or defendant's exhibits.

23 You may request that any testimony be read back to you.

24 If you do request a rereading of testimony, you might wish

25 to specify with particularity some portion of it that you

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2 are particularly interested in. You may request that
3 any portion of this charge be read back to you. Again,
4 it may be that you wish some particular portion of it read
5 back to you. If so, please indicate that.

6 We will send a copy of the indictment into the
7 jury room, but you must remember that an indictment is not
8 evidence. It is herely an accusation. It has no evidentiary
9 value whatsoever.

10 All requests from you must be in writing and
11 your forelady will submit them to the marshal who, in turn,
12 will submit them to the Court, if there are any.

13 You are instructed that you must not reveal
14 the standing of the jurors at any time during your deliber-
15 erations. You are not to indicate the split of any vote
16 on any count for any verdict to anyone, including the Court.

17 Madam Forelady, please lead the jury to the jury
18 room for a few moments, and then we will call you right back
19 out. Don't begin your deliberations yet.

20 (The jury left the courtroom.)

21 THE COURT: All right. I will take exceptions.

22 MR. HOLTZMAN: Your Honor, first, I believe you
23 indicated in discussing the defendant's failure to take
24 the stand that no unreasonable inference can be drawn

25 from it. Indeed, no inference whatever can be drawn from

1 lzmch 46

2 that.

3 THE COURT: Let me find that. If I said that --

4 MR. HOLTZMAN: I believe so, your Honor.

5 THE COURT: You may draw no unfavorable inference
6 against the defendant because he did not take the stand
7 and testify.

8 MR. HOLTZMAN: My recollection is your Honor
9 said "unreasonable" instead of "unfavorable."

10 THE COURT: You had better find it.

11 (Record read)

12 THE COURT: Are you satisfied with "You may
13 draw no unfavorable inference"?

14 MR. HOLTZMAN: Yes, your Honor, I am.

15 THE COURT: I will correct it.

16 MR. HOLTZMAN: Your Honor, with respect to
17 circumstantial evidence, you gave an example which I found
18 fine except that it didn't wind up being balanced.

19 Under the circumstances of this case where the
20 Government is contending that Rivera and my client went
21 into a building and then Rivera came out with drugs he
22 didn't earlier have, I would suggest that in view of the fact

23 that the facts here also indicate the presence of a third

24 person, that the example for circumstantial evidence you

25 gave was somewhat misleading, perhaps, to this jury.

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2 THE COURT: Exception noted and denied.

3 MR. HOLTZMAN: Your Honor indicated, I believe,
4 at one time about statements that my client, Mr. Ramirez,
5 allegedly made to Cruz and which Cruz testified to. My
6 recollection is that there was no evidence from Cruz that
7 Ramirez said anything to him.

8 Is that yours, Mr. Moss?

9 MR. MOSS: That is my recollection as well.
10 The conversation that Cruz testified about is one with Fernando
11 Gallardo and the coconspirator Herminio Gutierrez. He
12 testified to having seen Victor at various times but never
13 having spoken to him.

14 THE COURT: You say that as far as Cruz is
15 concerned there is no evidence that Cruz ever spoke --
16 that what?

17 MR. HOLTZMAN: That Cruz ever spoke with my
18 client Ramirez, and he gave no such testimony.

19 MR. MOSS: It was included in the charge under
20 your treatment of admissions.

21 THE COURT: All right, I will correct that.

22 MR. HOLTZMAN: Your Honor also indicated that,
23 with respect to the acts of Cruz and Valentine which preceded
24 the date of the conspiracy alleged in the indictment, that
25 the jurors would consider that for background only and for

1 lzmch 48

2 no other purpose.

3 The implication of that, I would suggest, is
4 that what it reveals about their bad character the jurors
5 may feel they may not consider it in that context and
6 it is my position that the jurors can consider it on that
7 basis. In other words, that Cruz --

8 THE COURT: Read this back to me, Mr. Zuck.

9 (Record read)

10 MR. HOLTZMAN: I could have framed it much
11 better.

12 THE COURT: Marshal, would you open the door,
13 please?

14 I understand your point. I agree.

15 MR. HOLTZMAN: My next exception, your Honor,
16 is with respect to the charge on similar acts. It has been
17 my position throughout that similar acts have no bearing
18 on the second count of this indictment because of the
19 Government's theory of the case. There is no issue of
20 motive, intent or knowledge.

21 If the jurors believed that my client went in
22 and transferred drugs, they don't need similar acts to
23 clarify motive, intent or knowledge.

24 THE COURT: Just a moment.

25 ~~Exception noted; denied~~ Exception noted; denied.

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2 MR. HOLTZMAN: Your Honor, with respect to
3 inconsistent statements, I would request that you further
4 charge because of the fact that I have adduced evidence
5 of inconsistent statements made by Valentine and Cruz
6 under oath that those inconsistent statements do not merely
7 reflect on credibility but, in addition, can be accepted,
8 if the jury believes them, as affirmative evidence as to
9 what is asserted in those transcripts of Valentine and
10 Cruz, and I believe the new rules provide for that.

11 THE COURT: Mr. Moss, I will hear you in
12 opposition to that, if there is opposition.

13 MR. MOSS: Now let me have that read back,
14 please.

15 THE COURT: He says the Desisto rule as it
16 exists in the new rules benefits the defendant as well
17 as the Government, and that he should have the benefit of
18 it insofar as he has produced evidence of alleged prior
19 inconsistent statements. That's 801(d)(1).

20 MR. MOSS: I recall that your Honor did touch
21 on that in your charge.

22 THE COURT: I mentioned inconsistent statements.
23 Just a moment.

24 The question is what is meant by the trial or
25 hearing. It reads, the declarant testifies at the trial

1 lzmch 50

2 or hearing and is subject to cross-examination concerning
3 the statement, and the statement is (a) inconsistent with
4 his testimony and was given under oath subject to penalty
5 of perjury on a trial, hearing or in a deposition. Maybe
6 there is no real problem with that.

7 Just a moment. I will look it up.

8 Here it is. I have given the charge and it is
9 sufficiently broad to cover anybody's witness, including
10 the witness you are referring to.

11 MR. HOLTZMAN: I only understood your charge
12 to indicate that they could consider a prior inconsistent
13 statement on the question of credibility. I am further
14 requesting that your Honor indicate that they can accept
15 the prior inconsistent statement for what is asserted
16 therein, and that's the distinction.

17 THE COURT: You no doubt expected this to be
18 part of the case because you came forth with copies of the
19 statements made at the prior trial, so if you would hand up
20 your proposed instruction to the jury, I will consider it.

21 MR. HOLTZMAN: Can I quickly draft one, your
22 Honor?

23 THE COURT: Please do.

24 Anything else?

25 MR. HOLTZMAN: Yes. There are a number of other

1 lzmch 51

2 things, your Honor.

3 Your Honor indicated that with respect to the
4 testimony of an informant it was to be weighed with great
5 care. I'm sure that what your Honor was referring to was
6 the statement of the alleged coconspirators and I'm not
7 sure that the jury understood that, so that I don't know
8 that they understand there to be any instruction as to weigh
9 the testimony of Cruz and Valentine with great care.

10 THE COURT: No, I intended it for anything that
11 they may have heard, even with all the limitations that
12 came out of the mouth of Rene Rivera. That wasn't offered
13 for the truth of what was asserted, but in an excess of
14 caution I have instructed them nevertheless that they
15 must not only not take it for the truth of what is asserted,
16 but they must also be very careful in even taking it for the
17 fact of it being stated.

18 Perhaps that is not clear and I can state it
19 again.

20 MR. HOLTZMAN: Well, what really concerned me
21 was the fact that I didn't understand your Honor to give
22 them any instruction as to the great care that the testimony
23 of Cruz and Valentine was to be weighed with.

24 THE COURT: You knew that they were going to be
25 instructed and no doubt have asked for an instruction

1 lzmch 52

2 regarding that. If you show it to me, I will consider that.

3 MR. HOLTZMAN: The Government specifically
4 requested such an instruction.

5 THE COURT: The Government isn't asking anything.
6 I want to know what do you want me to tell the jury?

7 MR. HOLTZMAN: I want you merely to instruct
8 the jury that, with respect to the testimony of Valentine
9 and Cruz, it is to be weighed carefully and with great
10 care because they are alleged coconspirators, or at least
11 that's the Government's position.

12 THE COURT: Are they alleged coconspirators?

13 MR. MOSS: They are not alleged coconspirators
14 but they are accomplices.

15 MR. HOLTZMAN: Excuse me, your Honor, accomplices
16 in some sense. I'm sorry.

17 MR. MOSS: The Government's request is request
18 No. 21 and it is a request which I have heard given in many
19 other cases and it balances the -- a cautionary instruction
20 to the jury to weigh accomplices' testimony with care.

21 THE COURT: Are you satisfied with the request
22 by the Government, Mr. Holtzman?

23 MR. HOLTZMAN: Insofar as it indicates that the
24 testimony is to be weighed with care, your Honor.

25 THE COURT: Tell me how you are dissatisfied

1 lzmch 53

2 insofar as anything. I want to know are you satisfied
3 with this, or give me another charge and I will consider
4 yours.

5 MR. HOLTZMAN: I am dissatisfied with so much of
6 it, your Honor, that indicates that often the Government
7 has no choice but to call such people and that the Government
8 must rely upon such witnesses, but I am satisfied insofar
9 as it indicates that the testimony of such witnesses should
10 be weighed with great care.

11 Your Honor, let me say something, if I may.
12 My understanding was that when you had asked for requests
13 to charge, that at the time you did so you said if you have
14 something that's a little unusual or exotic, I frankly
15 didn't make such a submission because I just thought in
16 the normal course of events that your Honor would charge
17 that, and I apologize to you for not having submitted a
18 request on this particular subject.

19 Your Honor, with respect to my suggestion con-
20 cerning the affirmative evidence aspect of the other
21 transcripts, I would merely ask you to charge the jury that,
22 with respect to the prior testimony of Valentine and Cruz,
23 the jury may find or may consider that testimony for its
24 truth, and that will be fine with me. They may consider
25 that testimony for its truth.

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2 THE COURT: That's on the prior inconsistent --

3 MR. HOLTZMAN: Yes.

4 In other words, the prior testimony of Valentine
5 and Cruz which are Defendant's Exhibits E and F, I believe,
6 that the jury can consider that testimony for its truth.

7 THE COURT: All right. Any objection to that?

8 MR. MOSS: No objection.

9 MR. HOLTZMAN: Your Honor, with respect to the
10 constructive possession charge, my concern here is that the
11 jury may find that your Honor is talking a'out Ramirez'
12 constructive possession of drugs possessed by the third
13 person in the building. That is not the Government's
14 theory of the case and I'm fearful that they will conclude
15 that that was what your Honor was speaking about, and I'm
16 wondering if there is any way in which you can clarify that
17 for them, because it's not any part of the Government's
18 theory of the case, insofar as I know, that the unidentified
19 male in the hallway is in some way connected with this
20 criminal enterprise that is alleged.

21 Mr. Moss?

22 MR. MOSS: So far your Honor hasn't charged the

23 jury at all on what the Government's theory of the case is, and
24 how it views and doesn't view certain pieces of evidence, and
25 other pieces of evidence. I think that your Honor's

1 lzmch 55

2 instruction that constructive possession does not extend
3 to the situation where a person is merely present to someone
4 else's possession but must take place in the circumstances
5 where that first person has dominion or control over that
6 second person, I think that that clearly disposes of the
7 problem, if there is one, that Mr. Holtzman is raising.

8 THE COURT: Do you know what number your request
9 was on possession?

10 MR. MOSS: No. 15, your Honor.

11 THE COURT: In that request the Government
12 refers to the fact that the word "distribute" means the
13 actual constructive or attempted transfer of the drug.
14 That's in relation to "distribute."

15 The definition of "constructive possession"
16 is implicit in the sentence stating that control may be
17 demonstrated by the existence of a working relationship,
18 et cetera.

19 Do you not agree?

20 MR. MOSS: I agree.

21 THE COURT: Do you want to address Mr.
22 Holtzman's point again, Mr. Moss, that it may mislead the
23 jury with reference to the Government's position regarding
24 the individual in the hallway, in some hallway, who did
25 something or other?

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2 MR. MOSS: So far as I know, the Government
3 has not taken a position with respect to the participation
4 or lack of participation of any third party to that
5 transaction.

6 Quite frankly, because he is an unidentified
7 male and the informant Rene Rivera is not available to
8 testify about those occurrences, his participation, if at
9 all, in this transaction is a mystery to the Government
10 and we have not taken a position one way or another.

11 THE COURT: Did it come out explicitly that
12 there was an unidentified male in the hallway?

13 MR. MOSS: He is mentioned in the transcript
14 and there is a very brief conversation with that unidentified
15 male out of the presence of Victor Ramirez.

16 THE COURT: Which transcript, do you recall?

17 MR. MOSS: This is the third transcript, which
18 is Government's Exhibit 7.

19 MR. HOLTZMAN: There is an indication in that
20 transcript only, your Honor, conversation between Rene and
21 unidentified male.

22 THE COURT: If the jury asks for that exhibit,
23 then we will consider whether to give some additional
24 instruction about the matter.

25 MR. HOLTZMAN: Your Honor will not do that now,

2 then?

3 THE COURT: No, I think not.

4 MR. HOLTZMAN: Your Honor, with respect to
5 aiding and abetting, again your charge, I would submit, may
6 suggest to the jury that in some sense they can find the
7 defendant Ramirez guilty if he was aiding and abetting this
8 unidentified male who made a transfer. Again, that's not
9 the Government's theory of the case.

10 THE COURT: I don't think that the aiding and
11 abetting charge allows for that interpretation. It's pretty
12 standard, aiding and abetting language. In fact, it ends
13 up on precisely the note that is the opposite of what you
14 are saying. Let me just find it here.

15 I state you may not find the defendant guilty
16 of aiding and abetting unless you find beyond a reasonable
17 doubt that every element of the offense of illegal
18 distributing and possessing with intent to distribute
19 heroin, as defined in these instructions, was committed by
20 some person or persons, and that the defendant knowingly
21 and wilfully participated in its commission.

22 MR. HOLTZMAN: Again, I think that that opens
23 the door to the possibility that the jury will conclude
24 that Ramirez aided and abetted this unidentified male in
25 the hallway. I don't think the Government should be permitted

1 lzmch 58

2 to gain that advantage because it's just not their theory
3 of the case, regardless of whether Mr. Moss says they have
4 taken a position or they have not.

5 The posture of this case is such, your Honor --

6 THE COURT: Once again, I am not bound by their
7 theory of the case. They may have any number of theories
8 that I don't happen to agree with, but I don't have to agree
9 or disagree with their theory. It just has to be within
10 the embrace of the indictment and the embrace of the
11 evidence, and the charge must be correct insofar as it
12 addresses the point.

13 Do you want to speak to that?

14 MR. HOLTZMAN: Your Honor, you and I have had
15 a disagreement with respect to that before.

16 THE COURT: Do you want to say anything on the
17 record with respect to this?

18 MR. MOSS: No, your Honor.

19 MR. HOLTZMAN: Your Honor, during the course
20 of your charge there was a little noise and I was distracted,
21 and I am asking you frankly whether or not in your charge
22 on aiding and abetting you indicated that mere presence,

23 association or even knowledge is not sufficient to base a

24 conviction on aiding and abetting upon.

25 THE COURT: You know I don't recall that being

1 lzmch 59

2 given.

3 MR. HOLTZMAN: I think I requested that and
4 your Honor indicated in substance you would charge it.

5 THE COURT: Dig it out and I will give it.

6 Did I instruct them that, as far as Rene
7 Rivera was concerned, anything he may be found to have said
8 on transcripts or otherwise can not be taken for the truth
9 but for the fact? I recall working on it. I don't recall
10 whether it was given.

11 MR. MOSS: During the trial I believe you gave
12 such an instruction.

13 THE COURT: But not during the charge. All
14 right. I had better give that.

15 Where are you, Mr. Holtzman?

16 MR. HOLTZMAN: I am right over here and I am
17 looking at my request, your Honor. I am about to concede,
18 frankly, that it doesn't articulate this aspect, either,
19 under Terrell or Garguilo, both of which I have cited, but
20 I haven't cited them for the mere presence and mere knowledge
21 or mere association, and I am sorry. I don't know how I
22 overlooked that, frankly.

23 MR. MOSS: It strikes me that, in connection
24 with your aiding and abetting charge, you did charge the
25 jury that mere presence while someone else possessed heroin

1 lzmch 60

2 was not sufficient to constitute a violation. Whether that
3 extends as well to a substantive crime outside the context
4 of aiding and abetting, I don't think your Honor addressed
5 that.

6 MR. HOLTZMAN: Did your Honor, on the conspiracy
7 count again, because I don't remember, indicate that
8 mere presence, mere association, mere knowledge, was
9 insufficient? Again because of the distraction I don't
10 remember if your Honor charged that, but I would ask that
11 you do if you have not.

12 THE COURT: In connection with the conspiracy
13 portion, I charged the mere fact that a person may be
14 seen with an alleged coconspirator is not in itself enough
15 to make him a coconspirator. Before you can find that
16 the defendant is a member of the conspiracy charged, you
17 must find beyond a reasonable doubt that he wilfully joined
18 the conspiracy, aware of its aims.

19 MR. HOLTZMAN: Did your Honor also charge that
20 he must have a stake in the venture because Terrell requires
21 that as well?

22 THE COURT: Did you request it?

23 MR. HOLTZMAN: In the conspiracy, I believe I
24 did, your Honor, yes. Under the conspiracy I did. Request
25 No. 2, your Honor. your Honor 25 No. 2, your Honor 25 No

1 lzmch 61

2 You must find beyond a reasonable doubt that he
3 joined the others with the intention of making their
4 business his business, and that he came to have a personal
5 stake in the outcome of their venture.

6 THE COURT: Do you agree?

7 MR. MOSS: I have no objection to including
8 it if you wish, if Mr. Holtzman wishes. I'm not sure
9 I understand the law to require that language.

10 THE COURT: I am not sure that it's required,
11 either.

12 MR. HOLTZMAN: Your Honor, I believe in Terrell
13 the Court indicated that it wasn't required but that it was
14 desirable in conspiracy cases to give such an instruction
15 as well as one with respect to mere presence, mere associ-
16 ation.

17 THE COURT: Circle it in red and I will give it.
18 The Government has no objection.

19 MR. HOLTZMAN: That's my Request No. 2, your
20 Honor.

21 THE COURT: Whatever it is, Mr. Holtzman, just
22 give it to me and I will read it, as long as it is correct.

23 FINE, I GIVE THAT. Fine, I will give that.

24 MR. HOLTZMAN: And will your Honor also indicate

25 that mere association or knowledge is equally insufficient

1 lzmch 62

2 to predicate a finding of guilt.

3 That's in my charge request as well, your
4 Honor.

5 THE COURT: No, I think that's sufficient.
6 I just read to you what I told them in that regard. "Seen
7 with" is the same thing as "associated with," is it not?

8 MR. HOLTZMAN: Yes, but your Honor hasn't
9 indicated that a person who even knows that a criminal
10 enterprise is going on and associates with conspirators
11 and is seen with them, that all of that alone is still
12 insufficient to justify a conviction upon. That's my
13 understanding of Terrell.

14 THE COURT: Did you ask for that?

15 MR. HOLTZMAN: Yes, I did, your Honor.

16 THE COURT: Point it out.

17 MR. HOLTZMAN: No. 3, a person does not become
18 a member of a conspiracy solely because he was in the
19 company of the conspirators, visited with them, or even went
20 someplace with them.

21 In No. 4 I have: Furthermore, even if you believe
22 that Ramirez knew of a plan by Gutierrez to sell the narcotics

23 or learned of the sale after it occurred, this, too, alone
24 is insufficient to make him a member of the conspiracy.

25 THE COURT: Mr. Moss?

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2 MR. MOSS: I, too, believe that your Honor's
3 charge, as you read it back to us and as I remember your
4 having given it to the jury, sufficiently covers the area.
5 However, I don't have any strong objection to your erring
6 on the side of caution.

7 THE COURT: All right. I will do that. I will
8 give them the whole charge all over, Mr. Holtzman.

9 MR. HOLTZMAN: Please, your Honor, don't do that.

10 THE COURT: What else? Tell me what is it
11 that you want me to tell them in connection with accomplice
12 testimony again?

13 MR. HOLTZMAN: Your Honor, with respect to the
14 accomplice testimony of Cruz and Valentine that they are
15 to weigh it with extreme caution.

16 THE COURT: Extreme caution?

17 MR. MOSS: I would say with great care and
18 with caution. I believe those are the words of the Second
19 Circuit.

20 THE COURT: With great care and with caution.
21 That's what I will give.

22 Do you have any, Mr. Moss?

23 MR. MOSS: Well, with respect to the
24 accomplice testimony, I believe that a fair charge in that
25 regard is to add to those comments about the necessity for

1 lzmch 64

2 weighing the testimony with great care is to also inform the
3 jury that frequently the Government is required to call
4 such witnesses because those are the witnesses who have
5 participated in the crimes that the Government is required
6 to prove.

7 THE COURT: I agree. I will give some portion
8 of that.

9 MR. HOLTZMAN: I would take exception to that,
10 your Honor.

11 THE COURT: You mean you want what you have
12 asked for but you don't want me to give what Mr. Moss
13 asked for.

14 MR. HOLTZMAN: That's correct. I can't be too
15 magnanimous here, your Honor, I'm sorry.

16 THE COURT: The Government is only looking for
17 some balance here in this request.

18 MR. HOLTZMAN: Your Honor --

19 THE COURT: All right. I will give a portion
20 of that.

21 MR. HOLTZMAN: My interpreter indicates to me
22 that she desperately has to leave the room to go to the
23 ladies' room, if she may.

24 THE COURT: Okay, please.

25 MR. HOLTZMAN: Your Honor, in view of the

1 lzmch 65

2 inclemency of the weather and some of the jurors live outside
3 the County of Manhattan, I was wondering if you would
4 give them any assurance that their safe passage home would
5 be assured, should they have to deliberate for any extended
6 period of time.

7 I know in the past judges have made arrangements
8 for the transportation home of people who don't live
9 within the subway lines.

10 THE COURT: We are not going to keep them that
11 long, Mr. Holtzman.

12 MR. HOLTZMAN: I have a few comments about that,
13 but I will reserve them until a later time, your Honor.

14 THE COURT: Bring the jury in.

15 (Jury present)

16 THE COURT: All right. Let me add to and modify
17 some of the instructions which have been given.

18 You will recall my reference to what I referred
19 to as alleged prior inconsistent statements. You will
20 recall Mr. Holtzman reading to you some documents from some
21 other trial which related to statements allegedly made
22 by witnesses who testified here.

23 I charge you that you may consider that which
24 was offered as testimony from another trial for its truth
25 and not merely as bearing on the credibility of the witnesses

1 lzmch 66

2 concerned.

3 You may recall earlier instruction to you
4 concerning Rene Rivera. Let me repeat it to some extent
5 here now.

6 Insofar as certain statements, either in the
7 form of tapes, transcripts or otherwise, have been ascribed
8 to the unavailable witness Rene Rivera, you are not to
9 consider any such evidence for the truth thereof. You may
10 only consider any such statements for the fact of whether
11 it was said or not, and normally you wouldn't be allowed
12 to even consider it for that limited purpose, but it is
13 allowed here in order that you may have some opportunity
14 to consider it in the event that it may aid you in
15 understanding statements made by other persons, including,
16 in some instances, the defendant.

17 Addressing myself to the testimony of Cruz
18 and Valentine: In law they are known as accomplices insofar
19 as they may have participated in the commission of certain
20 crimes themselves. Testimony of this nature is to be
21 considered carefully and with great care and with caution.

22 Referring again to Mr. Cruz, I told you earlier
23 in my charge that Cruz may have spoken with defendant
24 Ramirez. It is agreed by both parties here that, as far as
25 Cruz is concerned, there is no evidence that he ever spoke

1 lzmch 67

2 with defendant Ramirez, and so there are no statements which
3 you are to consider for any purpose in that regard by way
4 of admissions or otherwise as far as Mr. Ramirez, the
5 defendant, is concerned.

6 I told you that certain evidence was to be
7 considered for background purposes only. That may have been
8 confusing in one regard. You may consider the background
9 of Mr. Cruz and Mr. Valentine insofar as their criminal
10 records are concerned, and you may consider that in connection
11 with the question of credibility as far as they are concerned.

12 I stated to you that you may draw no unreasonable
13 inferences with reference to the fact that the defendant
14 did not take the stand in this case. I intended to state,
15 and I tell you now, that you may draw no unfavorable
16 inferences. Disregard the word "unreasonable"; it should
17 be "unfavorable."

18 Now, one final thing. Let me return to the
19 conspiracy portion of the charge.

20 I charge you that the mere fact that a defendant
21 may be present at meetings or may be seen with one of the
22 members of a conspiracy or may associate with one of them or
23 have a friendship with one of them or work with one of them
24 is not in itself enough to make him a conspirator. Before
25 you can find that he is a member of a conspiracy, you must

1 lzmch69

2 find beyond a reasonable doubt that he, that is, the
3 defendant, wilfully joined the conspiracy, aware that his
4 acts were a part of the scheme to unlawfully possess and
5 distribute heroin. I remind you that "wilfully" means
6 knowingly and intentionally and deliberately.

7 Referring back to my charge with reference to
8 aiding and abetting, just one brief statement about
9 that.

10 I instruct you that the mere presence of the
11 defendant, should you find him to have been present, where
12 a crime was being committed, or mere knowledge by the
13 defendant, should that be your finding, that a crime was
14 being committed, or the mere negative acquiescence by
15 the defendant in the criminal conduct of others, should
16 that be your finding, even with guilty knowledge is not
17 sufficient to establish aiding and abetting.

18 Reference to accomplice testimony: I have
19 told you that such testimony must be received carefully
20 and with great caution and I remind you that in the pros-
21 ecution of crimes the Government is frequently called upon
22 to use witnesses who are accomplices or persons with
23 prior criminal records. Often it has no choice. The

24 Government must rely upon witnesses to transactions such as
25 they are. It is not frequent that people of impeccable

1 lzmch 69

2 reputation are witnesses to criminal endeavors. The
3 Government frequently must use such testimony because
4 otherwise it would be difficult or impossible to detect
5 or prosecute wrongdoers. So this evidence is properly
6 considered by you and such evidence should be received
7 with caution and weighed with care.

8 With reference to the question of whether or
9 not the defendant Victor Ramirez was a member of the alleged
10 conspiracy, you must find beyond a reasonable doubt that
11 he joined any such conspiracy with the intention of making
12 the business of the coconspirators his business, and that
13 he came to have a personal stake in the outcome of the
14 venture, and a person does not become a member of a conspiracy
15 merely because he was in their company, visited with them
16 or even went someplace with them, and even if you believe
17 that Mr. Ramirez knew of a plan by Gutierrez to sell
18 narcotics or learned of the sale after it occurred, this, too,
19 alone is insufficient to make him a member of the conspiracy
20 charged.

21 Swear the marshal.

22 (A marshal was duly sworn.)

23 THE COURT: Now, ladies and gentlemen, you are
24 going to go and deliberate. I have been telling you not
25 to deliberate all this time and I'm now instructing you to

1 lzmch 70

2 go and deliberate. Talk about the case; exchange views.

3 If you require anything from us, let us know.
4 We will send in a copy of the indictment through the
5 marshal, and I have already instructed you about that.

6 I will ask the alternates to remove their
7 garments from the jury room and to return to the courtroom.

8 We are not going to deliberate very late
9 tonight, but perhaps for an hour or so, and then you will
10 resume in the morning.

11 Alternates return to the courtroom with your
12 garments.

13 With that, Miss Forelady, lead the jury out.

14 (At 4:55 p.m., the jury retired to commence
15 their deliberations.)

16 THE COURT: What do you want to do, keep one
17 or two of them or let all three of them go? The rules say
18 we are supposed to let them go. I am willing to let them
19 go or keep one or more of them.

20 MR. HOLTZMAN: I am willing to let them go,
21 your Honor.

22 THE COURT: You too, Mr. Moss?

23 MR. MOSS: Yes.

24 THE COURT: Folks, we no longer require your
25 services in this case. The jury has begun its deliberation,

1 lzmch 71

2 which means that you are free to go. You are discharged
3 from further service in the trial of this case. Thank you
4 for your service.

5 (Alternate jurors excused.)

6 THE COURT: Mr. Holtzman and Mr. Moss, stay
7 close for about an hour.

8 (Recess)

9 (At 5:40 p.m., a note was received from the
10 jury.)

11 (In open court)

12 THE COURT: We have a note from the jury which
13 will be marked as Court's Exhibit 9, and it reads:

14 On the Count No. 1 do we have -- I suppose
15 they mean to agree on all six of the charges, or just
16 one before we make our decision?

17 Are there not six overt acts charged?

18 MR. MOSS: That's correct.

19 THE COURT: I would assume they are referring
20 to the overt acts and if you agree I would simply answer them -
21 I would simply state that I believe we understand them to
22 be talking about the overt acts and that the answer is "no."

23 MR. MOSS: Your Honor might perhaps repeat that
24 portion of the Court's charge.

25 THE COURT: I could do that also.

1 lzmch 72

2 MR. MOSS: Which indicates that they need only
3 find that a member of the conspiracy has committed one
4 overt act in the Southern District of New York within the
5 dates of the conspiracy.

6 THE COURT: Mr. Holtzman?

7 MR. HOLTZMAN: That seem appropriate, I suppose.

8 THE COURT: The next is:

9 We would like to see all the transcripts of the
10 tapes, both the prosecutor's and the defendant's.

11 MR. HOLTZMAN: I assume they are referring to
12 my Exhibits A, B and C, your Honor.

13 MR. MOSS: My Exhibits 5, 6, 7, 8 and 9 are
14 collected and I have them redacted for them.

15 THE COURT: Third, we would like to see all the
16 pictures taken.

17 MR. MOSS: Those are Exhibits 12 through 24.

18 THE COURT: Let's assemble all the physical
19 evidence and that can go in, but bring the jury out and
20 I will give them this answer to No. 1.

21 (Jury present)

22 THE COURT: We have your note. We will send
23 in the physical evidence which you have requested. There
24 is a brief response to your first question in which you
25 ask, On Count No. 1 do we have to agree on all six of the

1 lzmch 73

2 charges or just one before we make our decision?

3 First of all, we assume that what you are
4 talking about are the overt acts. Let me just read this
5 brief portion to you concerning overt acts.

6 The third element of the charge of conspiracy
7 is the overt act element. An overt act need not in itself
8 be a criminal act. It is one of the elements of a conspiracy
9 charge because, if found to exist, it demonstrates that
10 the conspirators have gone beyond the stage of merely
11 thinking about an illegal goal. It can be any act such
12 as, for example, a meeting, as long as it is an act performed
13 in furtherance of the conspiracy.

14 The Government need not prove that all of the
15 overt acts alleged in the indictment were performed. It
16 is sufficient if it proves that one of the overt acts was
17 performed in the Southern District of New York, and that
18 it was in furtherance of the conspiracy charged, and that
19 it occurred during the period of the conspiracy as charged.

20 Does that answer your question?

21 All right.

22 MR. HOLTZMAN: Your Honor, may I approach the
23 bench for a moment with Mr. Moss?

24 THE COURT: Up to the side.

25 (At the side bar)

1 lzmch 74

2 MR. HOLTZMAN: Your Honor, can you please
3 indicate that of course you have to consider all your
4 other instructions on conspiracy as well, so that this is
5 not just isolated?

6 THE COURT: No, they asked a specific question.
7 I gave them a specific answer. I don't think I need tell
8 them any more. I think it's obvious they are considering
9 the charge. They only want clarification on one portion of
10 it.

11 (In open court)

12 THE COURT: Okay. Hand the physical exhibits
13 to the marshal.

14 Ladies and gentlemen, resume your deliberations.

15 (At 5:45 p.m., the jury retired to resume their
16 deliberations.)

17 (At 6:35 p.m., a note was received from the
18 jury.)

19 (In open court)

20 THE COURT: There is a note from the jury that
21 will be marked Court's Exhibit 10.

22 We would like to know where is the evidence did
23 Victor Ramirez conspire before August 15? Can we have a
24 magnifying glass to look at the pictures?

25 Here is a magnifying glass. I entrust it to

1 lzmch 75

2 the deputy courtroom clerk with the expectation he will
3 personally see to it I get this back or one just like it.

4 (Court Exhibits Nos. 9 and 10 were marked.)

5 MR. HOLTZMAN: Your Honor, I will take exception
6 to giving them a magnifying glass.

7 THE COURT: Do you want to be heard?

8 MR. HOLTZMAN: I would like to be heard briefly,
9 if I may.

10 THE COURT: Isn't that sort of like the light
11 goes out or the light is not bright enough and they ask
12 for a little brighter light in there so they see some
13 evidence? Can we really deny a jury the opportunity to
14 view with as much efficacy as possible evidence?

15 MR. HOLTZMAN: If I may, the reason I take the
16 position I do, your Honor, is because of the fact that,
17 although I am not very expert at optics, it seems to me there
18 may be distortions and things of that character by an
19 examination of something under a magnifying glass. They may
20 not have a true image.

21 THE COURT: You are perfectly right, but I will
22 send it in there, distortions or not. You can mark that as
23 a Court exhibit, Mr. Holtzman, so the Court can see what
24 the distortions are.

25 MR. HOLTZMAN: I don't know if they have any

2 optic experts there either, your Honor.

3 THE COURT: I may never reach them in any event.

4 Let's see, the magnifying glass, the answer is
5 yes and I have provided the one I use in chambers.

6 The other is about this evidence. Did Victor
7 Ramirez conspire before August 15. It seems to me what they
8 are asking is, they want to know about evidence which
9 involves Gutierrez probably.

10 MR. HOLTZMAN: I cannot do other than interpret
11 their note on its face.

12 THE COURT: I think we will have to respond to
13 this, if you agree, by saying that we are not going to --
14 we will not recap, I will not recap the evidence. They
15 are free to ask for whatever they wish to have in this regard,
16 and ask them to resume their deliberations tomorrow morning.

17 MR. HOLTZMAN: That's fine with me, your Honor.

18 MR. MOSS: That's fair enough, with perhaps
19 one additional request.

20 If what is bothering them is the fact that
21 the period of the conspiracy charged in the indictment
22 begins in March of 1975 and continues through October, and
23 they are seeking evidence that would establish that
24 Victor Ramirez' participation covered that entire period of
25 time, then it may be that the Court's charge on duration of

1 lzmch 77

2 a conspiracy did not get across to the jury as completely
3 as it might have.

4 THE COURT: That seemed to me to be about as
5 clear as you could make it, but if they want that they have
6 but to ask for it.

7 The second note is marked Court's Exhibit 11.

8 Can we resume our deliberations tomorrow
9 morning, and the answer is yes.

10 Agreed?

11 MR. HOLTZMAN: Yes, your Honor.

12 THE COURT: Bring in the jury.

13 What time do you suggest in the morning?

14 MR. HOLTZMAN: Your Honor, since some of them
15 live in rather remote areas, maybe 10:00 o'clock or so
16 would be convenient to them.

17 THE COURT: Let's make it 9:30.

18 Do we have somebody from Rockland?

19 MR. HOLTZMAN: I think we have somebody from
20 Rockland and at least one person from Westchester County,
21 your Honor.

22 (Court's Exhibit No. 11 was marked.)

23 (Jury present)

24 THE COURT: Well, we have your notes. Please
25 be seated.

1 lzmch 78

2 One asked for a magnifying glass and we will
3 furnish that. The forelady is asked to see to it personally
4 that it is returned to the marshal, and the marshal in
5 turn to return it to the deputy courtroom clerk, so it
6 gets back into my desk drawer.

7 The next is you asked, you say we would like,
8 I suppose it means, to know where in the evidence did
9 Victor Ramirez conspire before August 15?

10 Essentially, what you have asked for is for
11 the Court to recap the evidence, and I'm not going to do that.
12 Essentially, the only way I could answer that question
13 would be to start at the beginning of the trial and go
14 right through to the end, so that you have all of the evidence,
15 because each side would be entitled to see to it that you did
16 have it all, but, at the same time, you are entitled to
17 any evidence which has been presented at this trial and
18 which is relied on by either party read back to you or
19 presented to you or made available to you, so you think about
20 it tomorrow morning, because that's your next note, that
21 you want to resume in the morning, think about it and let
22 us know what is it that you wish to have evidencewise.

23 We have had witnesses on the stand testify,
24 I suppose, for a couple of hours in some instances, and,
25 if you wish, you ask for that testimony. We will have all

1 lzmch 79

2 of that read back to you, or it may be that you have some
3 specific questions about somebody's testimony that you wish
4 reread to you.

5 Let us know, whatever it is. If you want it
6 all, we will give it to you. If you want portions of it,
7 we will give you that.

8 Among the twelve of you, I think you can determine
9 what it is that you are looking for. Ask us for it and we
10 will see that it is made available to you.

11 Mr. Golemis, you come from what county?

12 JUROR NO. 10: Rockland.

13 THE COURT: And Mr. Shanahan?

14 JUROR NO. 3: Ulster.

15 THE COURT: Is 9:30 satisfactory to each of
16 you? I would then say we should resume at 9:30 tomorrow
17 morning.

18 Madam Forelady, the jury should not resume its
19 deliberations until all twelve jurors are present. You
20 cannot deliberate until all twelve jurors are present and
21 of course there must be no discussion or deliberation outside
22 of the jury room.

23 You are now a very special breed. You are a
24 sworn jury deliberating. It makes you exceedingly special,
25 so please do not talk about the case with anyone and don't

1 lzmch 80

2 talk about the case among yourselves outside that jury
3 room and don't talk about it in the jury room until all
4 twelve of you are present.

5 I don't suppose there is any further instruction.

6 Return any exhibits you may have to the marshal
7 for safekeeping and do not wait for further instruction
8 from me in the morning. Resume on your own as soon as
9 all twelve of you are present and let the marshal know,
10 Madam Forelady, because that has happened, because he will
11 note the time.

12 Thank you all and good night.

13 (Adjournment taken to November 30, 1977 at
14 9:30 a.m.)
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1 wch 1

2 UNITED STATES OF AMERICA

3 v.

4 VICTOR RAMIREZ

5 November 30, 1976

6 - - -

7 THE COURT: We have two notes, Court's Exhibit
8 12 and Court's Exhibit 13. A third one will be Court's
9 Exhibit 14.

10 MR. HOLTZMAN: This may be one of the most
11 rare cases that has been tried here.

12 THE COURT: Here is 12. We would like to have
13 read back to us Valentine and Cruz's testimony. No problem
14 there, right?

15 MR. HOLTZMAN: None, your Honor.

16 THE COURT: Next we would like read back to us
17 the last part of judge's charge, conspiracy charge. I
18 understand Mr. Moss interprets that to mean they want
19 all of it. You interpret it to mean what?

20 MR. HOLTZMAN: I interpret it to mean that
21 part which you last read to them, after you sustained my
22 exceptions: presence, mere association, etc.

23 THE COURT: I do not so interpret it and I will
24 read all of the conspiracy charge to them.

25 Next is 13: We would like Agent Mockler's

1 wch 2

2 testimony read back. The word "read back" I am adding to it.

3 We would like the tape for transcript number 7.

4 To be played for them.

5 MR. HOLTZMAN: I assume they want it played,
6 yes. I want to say one thing with respect to that. My
7 interpreter could assist in locating that particular
8 portion but I would not like for the jurors to see her
9 working with that set. So outside of his presence she
10 can assist in finding it and then have it played to them.

11 THE COURT: Court's 14: Will you please let us
12 hear Mockler's testimony and the tape for transcript 7
13 before our request for Cruz and Valentine's testimony.

14 Let's do it this way.

15 MR. HOLTZMAN: Your Honor, may I ask one other
16 question with respect to this? Are we going to give them
17 that tape recorder to take into the jury room and listen to
18 it?

19 THE COURT: I am willing to do that and think that
20 it might be perfectly satisfactory.

21 MR. MOSS: The problem is that they probably
22 don't know how to work the Nagra tape machine, and that
23 tape is very easy to break, snap it off. I know how to
24 operate it, and it may be better to do it under controlled
25 circumstances of the courtroom.

1 wch 3

2 THE COURT: All right.

3 MR. MOSS: As well, I presume Mr. Holtzman
4 doesn't want them playing other sections of the tape
5 that contain the voices of agents.

6 THE COURT: We will do it out here, then.

7 MR. HOLTZMAN: Fine, your Honor. Do you think
8 we ought to locate that part of the tape right now so that
9 we don't lose any time? Because I believe they indicated
10 they wanted to hear that first.

11 THE COURT: Let me read them the conspiracy charge
12 first. Bring them in, and we will read the conspiracy
13 charge.

14 MR. HOLTZMAN: Your Honor, Miss Wells, Mr. Moss
15 and I have been over it with Miss Wells, and I believe
16 she has the portion that I was interested in, obviously,
17 presence, mere knowledge, etc., etc., including the part
18 that even if he knew about the transaction after it
19 occurred, that that was not sufficient.

20 THE COURT: Bring the jury in.

21 (Jury present)

22 (10:45 A.M.)

23 THE COURT: Good morning, ladies and gentlemen.
24 We have here various notes and we think we understand
25 what it is you wish. We are going to give you the conspiracy

wch 4

charge first, and then we will give you probably the Mockler testimony, and then the playing of the tape as far as transcript 72 is concerned. Then if you still wish Cruz and Valentine's testimony, that will be available to you as per your request.

So now, reading the conspiracy charge to the jury again, as requested:

The indictment charges that the defendant conspired, along with alleged co-conspirators, to distribute and possess with intent to distribute a narcotic drug-controlled substance, to wit, heroin.

Count 1. The Grand Jury charges:

1. From on or about the 1st day of March, 1975, and continuously thereafter up to and including the 1st day of October, 1975, in the Southern District of New York, Hermino Gutierrez, also known as Cuba, and Victor Ramirez, defendants, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly conspired, combined, confederated and agreed together and with each other to violate federal drug laws.

2. It was part of said conspiracy that the said defendant unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule 1 narcotic drug-controlled substances, the exact amount

1 wch 5

2 thereof being to the Grand Jury unknown, in violation of
3 federal drug laws.

4 The defendant therefore is charged with conspiring
5 to violate certain federal statutes which list heroin
6 as what is called a Schedule 1 narcotic drug-controlled
7 substance, and another federal statute which makes it un-
8 lawful for any person -- let me go back and read that
9 a little bit for emphasis.

10 Thus the defendant is charged with conspiring
11 to violate federal drug laws which list heroin as a drug-
12 controlled substance, and another federal statute which
13 makes it unlawful for any person to knowingly and in-
14 tentiously distribute heroin or to possess heroin with
15 the intent to distribute it.

16 You see, in order to conspire, you must conspire
17 to do something unlawful. One federal statute makes it
18 a conspiracy to conspire to violate the federal narcotic
19 laws. Another federal statute makes it a conspiracy
20 to traffic in certain designated narcotics. That is what
21 I am saying here.

22 Before you may convict the defendant under the
23 conspiracy charge, you must first find that the government
24 has proven beyond a reasonable doubt the following three
25 elements of the crime charged: First, that a single overall

1 wch 6

2 conspiracy as charged in the indictment actually existed.
3 The government charges that the co-conspirators in this
4 case were the defendant Rivera, Hermino Gutierrez and
5 Fernando Gallardo.

6 Let me correct that. The government charges
7 that the co-conspirators in this case were the defendant
8 Victor Ramirez, Hermino Gutierrez, and Fernando Gallardo.

9 Second, that you must find as the second element
10 that the defendant was a wilful, knowing member of the
11 conspiracy which you have found existed, if that is your
12 finding.

13 Third, you must find that at least one of the
14 overt acts alleged in the indictment was committed by
15 a member of the conspiracy.

16 As to the first element, the existence of the
17 conspiracy charge, a conspiracy is defined as an agreement
18 between two or more persons to accomplish some unlawful
19 purpose. It has been referred to loosely as a partnership
20 in crime. The gist of the crime is the agreement itself
21 to violate the law. Whether or not the alleged conspirators
22 ever accomplished what it is alleged that they conspired
23 to do is not material to the question of whether they are
24 guilty or not guilty of the crime of conspiracy.

25 It is not necessary, in order to establish the

wch 7

existence of a conspiracy, that there be evidence that the persons involved entered into a formal agreement. It is sufficient if two or more persons in any manner, through any means, came to a common understanding to accomplish certain unlawful goals.

It is not required that you find that all of those alleged to be co-conspirators join in the conspiracy in order for you to find that the conspiracy existed. But you must find that two or more persons did so agree.

In this case, to find that the conspiracy charged did in fact exist, you must be satisfied that some time between March 1, 1975, and October 1, 1975, an agreement existed between any of the three persons who are alleged to be co-conspirators: Ramirez, Gutierrez, Gallardo.

You must be further satisfied that it was part of the agreement to accomplish the aims set forth in the conspiracy count, that is, to distribute or to possess with intent to distribute a narcotic drug-controlled substance, to wit, heroin.

In this case you must find beyond a reasonable doubt that the defendant conspired with someone to possess with intent to distribute a drug-controlled substance known as heroin. I instruct you as a matter of law that heroin is a Schedule 1 narcotic drug-controlled substance as

defined by the statute under which the defendant is charged. However, you must still find beyond a reasonable doubt that the substance the defendant allegedly conspired to possess and distribute, which is Government's Exhibit 4, was in fact heroin.

It is not necessary that the government prove that the conspiracy existed throughout the entire period alleged in the indictment. It is sufficient that the government prove that during the time charged, a conspiracy arose and existed between the defendant and a co-conspirator.

In determining whether an unlawful conspiracy existed, you are to consider the evidence as to the acts and conduct of each of the persons the government alleges were co-conspirators. If the proof convinces you beyond a reasonable doubt that the minds of at least two persons met so as to bring about a deliberate agreement to do the acts set forth as the aims of the agreement, that is sufficient proof of the existence of a conspiracy and this would satisfy the first element of the crime.

The second element the government must prove is that the defendant was a knowing and wilful member of or party to the conspiracy. Knowledge exists in the mind. Since it is not possible to look into a person's mind for the purpose of seeing what went on, the only way you have

wch 9

for arriving at a decision on this question is for you to take into consideration all the facts and circumstances shown by the evidence and to determine from all such facts and circumstances whether the requisite knowledge was present at the time in question. Direct proof of knowledge is not necessary. Knowledge may be inferred from all the surrounding circumstances. An act is done knowingly if it is done voluntarily and purposefully and not because of mistake, accident, mere negligence, or for other innocent reason. An act is done wilfully if it is done knowingly and deliberately, with the purpose of disobeying or disregarding the law.

In this case you must be satisfied beyond a reasonable doubt that the defendant Victor Ramirez did wilfully and knowingly join the conspiracy, aware of its unlawful aims. It is not necessary that a person be fully informed as to the details or the scope of the conspiracy in order for you to find that he was a knowing and wilful member of the conspiracy.

He is equally culpable with the other member or members even though his participation may be more limited than that of other co-conspirators.

However, the mere fact that a person may be seen with an alleged co-conspirator is not in itself enough

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wch 10

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to make him a co-conspirator. The mere fact that a person may be present at meetings or may associate with one of the persons you find to have been a conspirator or have a friendship with one of them or have worked with one of them is not in itself enough to make the person charged a conspirator. Before you can find that the person charged is a member of a conspiracy, you must find beyond a reasonable doubt that that person wilfully joined the conspiracy, aware that his acts were a part of the scheme to unlawfully possess and distribute heroin. More accurately, that should be to unlawfully distribute and possess with intent to distribute heroin.

I remind you that wilfully means knowingly and intentionally and deliberately.

You must find beyond a reasonable doubt that the person charged joined the persons you found to be conspirators with the intention of making their business his business and that he came to have a personal stake in the outcome of their venture.

Furthermore, even if you believe that defendant knew of a plan by Gutierrez to sell the narcotics or learn of the sale after it occurred, this alone is insufficient to make him a member of the conspiracy charged.

To sum that up: before you can find the defendant

1 wch 11

2 is a member of the conspiracy charged, you must find beyond
3 a reasonable doubt that he wilfully joined the conspiracy,
4 aware of its aims.

5 When people enter into a conspiracy they become
6 agents for one another in carrying out that conspiracy.
7 So if you find that a conspiracy existed and that a particular
8 person was a knowing and wilful party to it, then that
9 person's acts and declarations which are performed during
10 the duration of the conspiracy and in furtherance of its
11 aims are binding upon any other person whom you find was
12 also a knowing and wilful member of the same conspiracy,
13 just as though that person had performed the acts and
14 made the declarations himself. And this is so even if the
15 person doesn't know about the act or statement of the
16 other person who is a member of this conspiracy which you
17 find and is not there when such act or declaration was
18 done or made. Thus, if you find that the defendant is a
19 co-conspirator, then however limited his role in furtherance
20 of the aims of the conspiracy may have been, he is responsible
21 for all that was done in furtherance of the conspiracy
22 by any member of the conspiracy.

23 The third element, the last element of the
24 charge of conspiracy, is the overt act element. An overt
25 act need not be in itself a criminal act. It is one of the

1 wch 12

2 elements of the conspiracy, because it demonstrates, if you
3 find that it occurred, that the conspirators have
4 gone beyond the stage of merely thinking about an illegal
5 goal. It is not a crime to think about an illegal goal.
6 It can be any act, such as, for example, a meeting, as long
7 as it is an act performed in furtherance of the conspiracy.
8 The government need not prove that all of the overt acts
9 alleged in the indictment were performed. It is sufficient
10 if it proves that one of the acts was performed in the
11 Southern District of New York and that it was performed
12 in furtherance of the conspiracy charged and that it was
13 performed by some member of the conspiracy and that it
14 occurred during the period of the conspiracy as charged.

15 Unless you wish me to, I will not read the
16 overt acts to you, since you have a copy of the indictment.
17 Is that all right, that I not read it?

18 If you determine that the conspiracy charged
19 existed, it is not necessary for the government to prove that
20 the defendant committed or participated in a particular
21 overt act, since, as I told you, the acts of any member
22 of the conspiracy done in furtherance of the conspiracy
23 become the acts of all other members of the conspiracy.

24 I instruct you as a matter of law that the
25 Borough of Manhattan in New York City is in the Southern

1 wch 13

2 District of New York, where the government alleges that
3 certain of these overt acts occurred. But you still must
4 find that one of the alleged overt acts occurred and that
5 it occurred in the Southern District of New York.

6 To conclude the conspiracy charge: If upon
7 all the evidence you believe and consider relevant you are
8 satisfied that the government has proved beyond a reasonable
9 doubt each of the three elements of the crime of conspiracy,
10 you will return a verdict of guilty. And if you are not
11 so satisfied, you will return a verdict of not guilty.

12 That is it on the conspiracy-charge business.

13 Play the tape.

14 MR. MOSS: Your Honor, we don't yet have that
15 portion of the tape isolated.

16 THE COURT: You do not?

17 MR. MOSS: No.

18 THE COURT: Do you want to --

19 MR. MOSS: It may take five or ten minutes
20 to do so.

21 THE COURT: How long is Mr. Mockler's testimony?

22 MR. MOSS: I believe he was on the stand for
23 as long as 45 minutes.

24 THE COURT: All right. Why don't you do this.
25 Five minutes to isolate out that portion.

1 wch 14

2 MR. HOLTZMAN: Your Honor, may we approach
3 the bench?

4 THE COURT: Yes, come up.

5 (At the bench)

6 MR. HOLTZMAN: It may take more than five or
7 ten minutes. My understanding is that it is toward the
8 end of the tape but it may take more than five minutes
9 and I didn't want your Honor to misrepresent to the jury.

10 THE COURT: Then we will just have to take the
11 time.

12 (To the jury) It is going to take 10, 15, maybe
13 20 minutes to find that. We will isolate that on the tape
14 and call you right back out as soon as we have it. Following
15 that, we will read Agent Mockler's testimony to you. So
16 return to the jury room, please.

17 Now, I am not asking you to stop deliberating.
18 It is just that I am aware that there are certain things
19 that you want that we haven't given you yet and which
20 we will be giving you as soon as we can.

21 (Jury retires to deliberate further at 25
22 to 12.

23 (Jury not present)

24 THE COURT: We have a note from the jury which
25 has been marked Court's Exhibit 15. You have seen the note.

1 wch 15

2 I think the answer to the second part -- can they have
3 the transcript in their hands -- is yes. The attorneys
4 have agreed to that, the point being that the transcript
5 is in redacted form.

6 MR. MOSS: That's correct.

7 THE COURT: Reflecting the court's rulings on
8 Mr. Holtzman's objections.

9 MR. HOLTZMAN: Yes. One other thing. They say
10 the transcripts. Of course they have --

11 THE COURT: Transcript.

12 MR. HOLTZMAN: Of course they have the
13 defendant's exhibit, which is also a transcript of that
14 conversation.

15 I have extra copies, frankly, and would be
16 happy to distribute them. I made the copies myself from
17 my own Exhibit A. If they are satisfactory to --

18 MR. MOSS: I assume if they are merely Xerox
19 copies of the exhibit that is already in evidence, I have
20 no objection. If they want to refer to that transcript
21 as well as the one that the government has introduced--
22 I understand that the defendant's copy is a preliminary
23 draft of the final that the government has.

24 THE COURT: What does it do to the redacted
25 portions?

1 wch 16

2 MR. HOLTZMAN: It was offered in evidence
3 before any redactions of any sort were made, but I am
4 stuck with that, obviously.

5 THE COURT: Then you don't care.

6 MR. MOSS: It has not been redacted, and I
7 did not object to the portions that have been redacted.

8 THE COURT: So the state of affairs is that
9 we are going to hand the jury at their request not just
10 the transcript which the government has offered into
11 evidence and which has been marked as 7 in evidence,
12 but we are going to hand them also Defendant's what?

13 MR. HOLTZMAN: Defendant's Exhibit A, your Honor.

14 THE COURT: A, all right. At one and the same
15 time. No problem with that.

16 I had told you earlier that if they asked for
17 this, I would give them an instruction on constructive
18 possession versus actual possession. I have reconsidered
19 the matter. Both of you are not in agreement as to any
20 instruction which I should give to them. And so I decline
21 to say anything to them about possession, actual or
22 constructive. And you have your exception on that.

23 MR. HOLTZMAN: Yes. Your Honor, because I
24 don't remember precisely what I said yesterday, let me
25 just briefly say it now, and that is that the government's

1 wch 17

2 theory of the case is, they have tried it, and as
3 I understand it is not that Ramirez could conceivably
4 be seen by the jury to have had the constructive possession
5 of drugs that the third person in the building may have
6 given to the informant. And I would like for your Honor
7 to make it clear that if they were to find that it is
8 the third person in the hallway that gave the drugs to
9 the informant, that they can't find that the possession
10 of the third person in the hallway is Ramirez's possession
11 constructively.

12 THE COURT: All right. It strikes me that since
13 you had a copy of the government request to charge in this
14 regard and since the government's request was at least
15 granted in substance if not outright granted -- I forget
16 which -- you were on notice that there was a request
17 by them for some reference to be made to actual and
18 constructive possession, and as far as the government's
19 theory of the case was concerned, you could have discussed
20 that in your brief and thereby dealt with it.

21 I don't see it as a legal matter. I think I
22 have properly instructed them on the law. You have your
23 exception. I am not going to say anything more to them
24 about it.

25 Now there is, however, something that I think I

1 wch 18

2 should do. When they get this transcript and the playing
3 of the tapes, I think I should make a brief statement
4 to them once again, informing them that statements
5 allegedly made by Rene Rivera are not to be considered
6 for the truth but rather for the fact, and also that it is
7 being made available for the purpose of providing a
8 context for their assessment of statements which are
9 attributed to the defendant.

10 And they have in their first portion of this
11 Court's exhibit--

12 MR. HOLTZMAN: Your Honor?

13 THE COURT: Yes, anything on that.

14 MR. HOLTZMAN: The only thing I want to say
15 is, I want to preserve all my earlier objections.

16 THE COURT: Yes. Now, on Court's 15 there is
17 a first paragraph which says that they don't understand
18 whether the period of the alleged conspiracy must be found
19 to have been substantial or what. It is true that in the
20 rereading I neglected to read one brief paragraph which
21 indicates that they must at least find that the conspiracy
22 charged must be found to have existed for a substantial
23 part of the period charged. I will tell them that.

24 MR. MOSS: Your Honor, I don't think that that
25 is the law.

1 wch 19

2 THE COURT: I had undertood it to be.

3 MR. HOLTZMAN: Mr. Moss took no exception
4 when your Honor gave that instruction yesterday, and I
5 agree with your Honor's interpretation of the law.

6 THE COURT: I had understood that to be the law
7 from earlier requests in numerous other conspiracy charges,
8 requests from the government, that is.

9 MR. MOSS: I would have to look through my
10 requests in order to see whether or not -- I don't believe
11 that that is contained in the request that I gave, and if
12 I was not attentive enough to have caught your Honor's
13 reference to it in your charge and did not object, I
14 do object now to your repeating that at this time. I
15 don't believe that the law in this circuit is that the
16 period of time stated in the indictment binds the govern-
17 ment to proving that within a substantial portion of that
18 period of time a conspiracy existed.

19 THE COURT: Why don't we take a quick moment
20 to look it up? Because something has to be told to them,
21 in light of their inquiry, and we should be correct. So
22 let's look it up. You get on the phone, counsel,
23 and see what you dig up and we will get on the phone
24 and see what we will dig up. And we will come right out
25 as soon as we have. It shouldn't take but a moment. Let's

1 wch 20

2 go.

3 MR. HOLTZMAN: Your Honor -- well, perhaps we ought
4 to leave this until we make these inquiries.

5 (Recess)

6 (12:45 P.M.)

7 THE COURT: Looking at government's request
8 number 7, there are two sentences. I will read the second.

9 MR. MOSS: Request number 7?

10 THE COURT: Yes. 7. "It is sufficient if you find
11 that in fact a conspiracy was formed and that it existed
12 for some substantial time within the period set forth
13 in the indictment and that at least one overt act was
14 committed during that period."

15 Given that, the government will not be permitted
16 to change its position in any event.

17 MR. MOSS: The position that I am stating is
18 that that request doesn't say that the conspiracy has to
19 exist for the substantial period of time alleged in the
20 indictment. It says that it has to exist for a substantial
21 period of time. In other words, it can't be fleeting or an
22 ephemeral thought in the minds.

23 THE COURT: My language to them, as proposed,
24 is that it is sufficient if it proves that the conspiracy
25 existed for a substantial part of that period.

1 wch 21

2 MR. MOSS: That is exactly what I would object
3 to, your Honor. We are not suggesting by that request
4 to charge --

5 THE COURT: Oh, I see.

6 MR. MOSS: -- that it is a percentage of the
7 period of time.

8 THE COURT: I think, given that, I will read
9 what they have requested. I will read what they have
10 requested.

11 MR. HOLTZMAN: I'm sorry. Now, what does your
12 Honor propose to do?

13 THE COURT: That it must be found to exist for
14 some substantial time within the period set forth in the
15 indictment.

16 MR. HOLTZMAN: And that is what your Honor will
17 indicate to them. And that I believe is what your Honor
18 previously indicated.

19 THE COURT: There is a little variance.

20 MR. MOSS: There is a variance and it is a
21 significant variance.

22 THE COURT: Bring the jury in and we will proceed.

23 MR. HOLTZMAN: Your Honor?

24 MR. MOSS: May I say one more thing? It may be
25 difficult for the jury to determine what you mean by

1 wch 22

2 substantial. The case law is clear that it only requires
3 that one overt act be committed any time within the period
4 alleged in the indictment and that the existence of the
5 conspiracy be proven to have occurred at one time within
6 the period of the indictment.

7 THE COURT: Leave that cite with us, but bring
8 the jury in in the meantime.

9 MR. HOLTZMAN: Your Honor, may I just have one
10 moment. I would like to say this, that to the extent
11 that your Honor is going to deviate from the charge
12 yesterday, my position would be that the charge yesterday
13 is the law of the case, especially in view of the fact
14 that Mr. Moss failed to take any exception to that whatever.
15 And to deviate now may be confusing to the jury as well.

16 THE COURT: The aim of the court, given the note
17 which is marked Court's Exhibit 15, is to clarify that which
18 they have a question about, and I will do it by reading
19 request number 7, which was requested by the government,
20 which I find best answers their confusion. You have your
21 exception.

22 Bring them in.

23 (At 12:50 P.M., jury present.)

24 THE COURT: I will bet the lunch just arrived.

25 No? Well, let's see now. We have your note 13. You asked

1 wch 23

2 two questions. One, about substantial, and the other about
3 whether you can hold copies of the transcript while listening
4 to the tapes. The answer to the second is yes. We will
5 give to you Government's 7 in evidence, and also
6 Defendant's A in evidence. You will have both.

7 In connection with those transcripts, let me
8 remind you again that statements allegedly made by Rene
9 Rivera, the unavailable witness, are not to be considered
10 by you for the truth of the matter asserted but only for
11 the fact that he made the statements attributed to him,
12 if you find that to have occurred. You may consider such
13 statements only to assist you, in that they may provide
14 you with a context for your assessment of the statements
15 attributed to the defendant.

16 "Please provide the transcripts and provide
17 with playing of the tapes."

18 Let me read the substantial to you. I am going
19 to give you that to get that out of the way.

20 The period of time charged in the indictment
21 runs from on or about March 1, 1975, to October 1, 1975.
22 It is not necessary for the government to prove that the
23 conspiracy started and ended on those specific dates. It
24 is sufficient if you find that in fact a conspiracy was
25 formed and that it existed for some substantial time

1 wch 24

2 within the period set forth in the indictment and that
3 at least one overt act was committed during that period,
4 that is, the period set forth in the indictment, March 1,
5 1975, to October 1, 1975, as to the overt act.

6 All right.

7 MR. MOSS: Your Honor, may I just hand out these
8 transcripts before I forget?

9 THE COURT: Yes. Hand out 7 in evidence and
10 A in evidence.

11 MR. MOSS: Your Honor, in the redacted form
12 I don't have sufficient number of transcripts for everyone
13 to hold in their hands.

14 THE COURT: Do what you wish in that regard.

15 JUROR NO. 4: Every other.

16 JUROR NO. 2: Are there six? Because we have
17 some in the jury room, too.

18 MR. MOSS: I believe we only have four, including
19 the one in the jury room.

20 THE COURT: Well, marshal, in the jury room,
21 will you bring out the Exhibit 7 in evidence.

22 (Pause)

23 THE COURT: All right, here is the other one.
24 Pass it out.

25 MR. MOSS: We have five copies, your Honor.

1 wch 25

2 (At the bench)

3 MR. HOLTZMAN: I don't think Mr. Moss has yet
4 found the part. He has found it but he has now to set
5 it so that it plays only that part. In other words, he
6 has located the area, but if you turn on the set now
7 it wouldn't start with the exact part that has been
8 requested.

9 MR. MOSS: There may be a minute or maybe even
10 more.

11 THE COURT: Any objection?

12 MR. HOLTZMAN: Yes, because I don't know what that
13 minute has on it. I think I would like it exactly.

14 MR. MOSS: I can try and locate it with earphones,
15 so the jury won't hear it, and as soon as I have started
16 in on the exact point, I will start it.

17 THE COURT: Good.

18 (In open court)

19 MR. MOSS: Your Honor, we are prepared to
20 proceed now.

21 THE COURT: All right.

22 (The tapes were played)

23 THE COURT: Now turning to witness Mockler's
24 testimony.

25 (Mr. Mockler's testimony was read)

1 wch 26 .

2 THE COURT: All right, that completes the
3 reading of the Mockler testimony. We have an additional
4 note from the jury marked Court's Exhibit 16.

5 The jury members would like you to please
6 reread the modification of your charge as read yesterday
7 regarding conspiracy. After tapes, please.

8 I have those items present and will read them.

9 MR. HOLTZMAN: Your Honor, may I approach
10 for a moment?

11 THE COURT: All right.

12 (At the bench)

13 MR. HOLTZMAN: Your Honor, may I just see that
14 note, because I don't remember that question.

15 Yes, I had not seen this note before, your Honor.
16 It must have come in while I was out at the library.

17 THE COURT: It just came in before the reading.
18 It was handed over by the forelady.

19 (Marked Court's Exhibit 16.)

20 MR. HOLTZMAN: Your Honor did, I believe,
21 incorporate that in the charge that you gave to them?

22 THE COURT: Right. What do you want me to tell them?
23 Not to do it again?

24 MR. MOSS: Maybe, if you make that clear to them,
25 they may not want you to go back over it.

1 wch 27

2 THE COURT: They have heard it and they have
3 sent the note.

4 MR. HOLTZMAN: Is your Honor going to reread
5 the conspiracy?

6 THE COURT: I am going to reread mere presence
7 and I am going to reread your request number 2.

8 MR. HOLTZMAN: Fine.

9 THE COURT: And I am going to reread your
10 request number 4.

11 MR. HOLTZMAN: Fine. Thank you, your Honor.

12 THE COURT: That is what I read to them, which
13 is what they call the modification.

14 MR. HOLTZMAN: Thank you.

15 (In open court)

16 THE COURT: Now answering this last note, which
17 I read to you, material read yesterday, after the charge
18 was given. The mere fact that a defendant may be present
19 at meetings or may be seen with one of the conspirators
20 or may associate with one of them or have a friendship
21 with one of them or work with one of them is not in itself
22 enough to make him a conspirator. Before you can find
23 that he is a member of a conspiracy, you must find beyond
24 a reasonable doubt that he wilfully joined the conspiracy,
25 aware that his acts were a part of the scheme to unlawfully

1 wch 28

2 possess and distribute heroin.

3 I remind you that wilfully means knowingly
4 and intentionally and deliberately.

5 Before you can find that the defendant was
6 a member of the alleged conspiracy, you must first find
7 that there was a conspiracy and that the government has
8 established beyond a reasonable doubt that Ramirez joined
9 with the others for the purpose of promoting their unlawful
10 venture and in an effort to make it succeed. You must
11 find beyond a reasonable doubt that he joined them
12 with the intention of making their business his business
13 and that he came to have a personal stake in the outcome
14 of their venture.

15 Even if you believe that Ramirez knew of a plan
16 by Gutierrez to sell the narcotics or learned of the
17 sale after it occurred, this too, alone, was insufficient
18 to make him a member of the conspiracy.

19 We will not read to you the testimony of Valentine
20 and Cruz at this time. Chances are your lunch is here.
21 We will take our own lunch as well. And you can resume your
22 deliberations if you wish now, or at least after lunch,
23 and if you wish to have Valentine and Cruz read to you
24 after lunch, send out a note and we will know that you
25 are ready for that to be read.

1 wch 29

2 MR. HOLTZMAN: Your Honor, may I approach, please?
3 Or perhaps you can excuse the jury and then I will take up
4 a matter I wish to do after. I'm sorry, your Honor.

5 THE COURT: Thank you. Ladies and gentlemen, please
6 go to the jury room. I guess the exhibits, if you are
7 finished with them, you can have the exhibits in the jury
8 room or you can leave them, as you see fit.

9 (The jury retired to deliberate at quarter to 2.)

10 MR. HOLTZMAN: Your Honor, I take exception
11 to the fact that you indicated to the jury that if they
12 still wanted the Valentine and Cruz testimony be read
13 that they should send another note. They have already
14 indicated that they want it to be read, and I am concerned
15 that your Honor, although I am sure not intentionally,
16 has perhaps suggested to them that that is unnecessary.
17 They made a clear indication of their desire to have that.
18 I take exception to your statement to them that they should
19 request it after lunch.

20 THE COURT: Fine. We are going to take lunch
21 now. We will take an hour.

22 MR. HOLTZMAN: Thank you.

23 (Luncheon recess)

24 (Jury not present, 4 P.M.)

25 THE COURT: It is now 4 o'clock. This jury began

1 wch 30

2 deliberations, I think, about 5 o'clock yesterday?

3 MR. HOLTZMAN: That's correct, your Honor.

4 THE COURT: And they have been deliberating,
5 including what they asked for from us since 9:30 this
6 morning, I gather. They did not go out for lunch, so they
7 have had a rather full day of it. I propose to send a note
8 in to them as follows: "Are you making any progress
9 with your deliberations?"

10 Any objection?

11 MR. MOSS: None from the government, your Honor.

12 MR. HOLTZMAN: Your Honor, my feeling only is
13 that perhaps they might interpret that as an impatience
14 by the court or something like that.

15 THE COURT: They might. But I think reasonably
16 enough time has passed that we might ask the question.

17 Mark it as Court's exhibit and get it back. It
18 will become Court's Exhibit 17.

19 (Court's Exhibit 17 marked.)

20 MR. HOLTZMAN: Will your Honor indicate as
21 well that their response should not indicate the votes
22 that they have got at this point?

23 THE COURT: Yes. I will put that down on the
24 note. I will add to it: Please do not indicate any vote on
25 any count.

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2 MR. MOSS: If I may say, your Honor, perhaps
3 they have reached a conclusion on one count.

4 THE COURT: That is my next step. Send this in,
5 please, and let's sit and wait and see what we will hear
6 from them.

7 Tell the marshal we want that note back.

8 MR. HOLTZMAN: Your Honor, I have considered
9 with my client and he has given me permission to represent
10 to you that we are in favor of a declaration of a mistrial
11 now and to conclude the deliberations at this time.

12 THE COURT: I deny that at this time. What
13 I am more apt to do, depending upon the exchanges which
14 we get back from them here and now, is to send them out
15 to dinner and to resume, and to continue late into the
16 evening if need be. And, frankly, if they are making any
17 progress, even then to bring them back tomorrow morning.

18 I have a problem, in that I have to leave here
19 at about, at least by 10 o'clock in order to catch a
20 noontime flight. But I am seeking now to get a judge
21 to cover me to take up behind me, which I am sure neither
22 of you would object to if it comes to that. And that is not
23 to suggest that I expect we are going to keep them just
24 indefinitely. But that is to share with you some of the
25 possibilities.

1 wch 32

2 I would think that it is even possible -- no,
3 there is not much I can do myself tomorrow morning and
4 still leave here by 10 o'clock. So I will try to find
5 a judge who can handle it for a few hours if need be.

6 (4:05 P.M., jury not present.)

7 THE COURT: I have a note. The answer is: "Yes,
8 we are making progress with our deliberations."

9 Marshal, step in the robing room with me a moment.
10 File this note. And, gentlemen, stay close in case
11 we do get something shortly. If we do not, I propose to
12 send them out to dinner, and that will be around 5. I
13 will let you know more specifically.

14 (Recess)
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1 lzh 33

11/30/76 2
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(9:20 P.M.)

3 THE COURT: We have a note from the jury which
4 reads "We have made considerable progress toward reaching
5 verdicts and we would like to continue our deliberations
6 tomorrow."

7 Well, for one thing, we have ordered vans to take
8 these jurors home. One lives as far away as Rockland County.
9 One lives in Ulster County and the vans are due here
10 at 11 o'clock. It is now 9:23. So one thing that I can
11 do is call them out and tell them that and ask them to
12 continue their deliberations in view of the fact that
13 arrangements have been made for their transportation
14 to their homes which should be of some convenience to
15 them in lieu of taking public transportation. To the best
16 of my recollection no mention has been made to them
17 heretofore of the use of vans so they may not have reckoned
18 with that.

19 Another thing is how do you feel about my
20 sending in a note which reads "Have you reached a unanimous
21 verdict on either count, yes or no?"

22 MR. HOLTZMAN: Your Honor, I'm opposed to that,
23 frankly.

24 THE COURT: Even if it is an acquittal?

25 MR. HOLTZMAN: I'm opposed to such a note, your

1 lzh 34

2 Honor. There is no point in making a long record about it.
3 I have strong feelings about it but there is no point in
4 putting it on the record.

5 THE COURT: I won't send it in yet.

6 MR. HOLTZMAN: Your Honor, may I say one thing
7 further, and that is while I understand that your Honor
8 is indicating they may have an apprehension or anxiety
9 about the distance they may have to travel, which may
10 be alleviated by their being told of the existence of
11 vans, this jury has been deliberating since 9:30 this
12 morning.

13 THE COURT: It happens in this courthouse, as you
14 know, all the time.

15 MR. HOLTZMAN: I know that, your Honor, but I'm
16 just thinking that perhaps after 12 hours and under the
17 circumstances that exist here maybe it is time to give
18 these jurors a break and to let them go home and come back
19 tomorrow.

20 THE COURT: I made special provision for them
21 for the dinner hour, recognizing that they had a long day.
22 I not only sent them out but I told the marshal to see to it
23 that they had a leisurely suppertime and that they should
24 remain out for at least a couple of hours and I understand

25 they left at 5 on the dot and did not resume until 7:10, two

1 12h 35

2 hours and ten minutes interruption, and it is only 9:25 now,
3 is plenty of respite for any human being.

4 MR. HOLTZMAN: They may have more stamina than
5 I do, your Honor.

6 THE COURT: Bring in the jury.

7 (Jury present.)

8 THE COURT: We have your note which will be
9 marked Court's Exhibit 18 and we can well understand
10 that you are tired. You were asked to come this morning
11 at 9:30. Did all of you assemble at that time, so that
12 you were able to start at 9:30? The day was interrupted
13 by, oh, I guess it was about two returns to the courtroom
14 for various information that you sought, various evidence.
15 One of those interruptions was fairly lengthy as we read back
16 all of the testimony of Special Agent Mockler and the tape
17 relating to Government's 7 in evidence and Defendant's
18 A in evidence, that being one tape. Then you had your lunch
19 inside and then at 5 o'clock you went to dinner.

20 I asked the marshal to see to it, if he could, that
21 that dinner hour was a leisurely one, that you were not
22 rushed, and having left at 5 I understand that you returned
23 and resumed at 7:10 and it is now going on 9:30. All of
24 this by way of saying, in addition to one other factor

25 which I haven't mentioned which is that I have ordered

2 vans as of the time you went to dinner. Vans were ordered
3 to deliver you to your respective homes at government
4 expense and those vans or limousines are not scheduled
5 to arrive until 11 o'clock so all of that by way of saying
6 I'm going to ask you to return and to continue your de-
7 liberations and you know now what you didn't know before,
8 that at least some provision has been made for you to be
9 transported to your homes other than by public transportation.

10 Let me just indicate one other thing. Should
11 you reach a verdict on either count, will you please
12 send out a note indicating that you have reached a verdict
13 and we will take that verdict. That is not an effort
14 to rush you into a verdict of one kind or another. Simply
15 to inform you that should that happen, you are free to
16 inform us of its occurrence.

17 Will you please return to the jury room and resume
18 your deliberations.

19 (At 9:33 P.M. the jury resumed their deliberations.)

20 THE COURT: Mr. Holtzman, no exception, no objection?

21 MR. HOLTZMAN: No, I made my record clear, your
22 Honor. I think we are all kind of weary at this point.

23 (Recess)

24 (10:47 P.M.)

25 THE COURT: It is 13 minutes of 11. The vans

1 lzh 37

2 will be here at 11 or may be here for all I know.

3 MR. HOLTZMAN: Your Honor, they are here. I
4 believe the marshal indicated or somebody indicated to
5 me that they are here if your Honor has a question about
6 that.

7 THE COURT: All right.

8 What is your name, marshal?

9 THE MARSHAL: Zerillo, your Honor.

10 THE COURT: I propose to send in a note which
11 reads, "Have you reached a unanimous verdict on either
12 count, yes or no. Please do not indicate any vote."

13 Mr. Holtzman, you object?

14 MR. HOLTZMAN: I do because you have already
15 solicited such an indication from them earlier and I'm
16 fearful that this will appear to them to be impatience
17 on your part with them or something of the like.

18 THE COURT: Are you referring to the request
19 made of the jury when, what hour was that made, pre-
20 dinner, post-dinner?

21 MR. HOLTZMAN: I think that was the last time
22 they were in, your Honor indicated --

23 THE COURT: No, I am trying to fix a time when.
24 When as that last time?

25 MR. HOLTZMAN: I don't know, maybe 9:30, your

1 lzh 38

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2 Honor, I'm not sure. 9:20.

3 THE COURT: Let me see that note, please.

4 MR. HOLTZMAN: I'm not sure whether it was--

5 THE COURT: No, when they came in at 9:20
6 they said they wanted to go home. There was no request
7 on my part as to whether they were still deliberating
8 so they indicated their position, right.

9 MR. HOLTZMAN: Your Honor, it was not in
10 a note. I think it was while they were in the courtroom,
11 one of the last things your Honor said to them was if they
12 had reached a verdict with respect to either count.

13 THE COURT: Yes, you are right.

14 MR. HOLTZMAN: So this is the second such
15 request.

16 THE COURT: Here goes the next request. Mark it
17 as a Court's exhibit and send it in.

18 (Court's Exhibit 19 marked for identification.)

19 THE COURT: The marshal says before he handed
20 them Court's Exhibit 19, they handed him a note. The note
21 reads "We have come to a verdict on one of the counts."
22 All right, bring in the jury.

23 (Court Exhibit 20 marked for identification.)

24 (Jury present)

25 THE COURT: Ladies and gentlemen, please be seated.

XXXXXXXXXXXXXX

Worth 6-1000

March 24, 1976

Assistant United States Attorney Michael
Q. Carey
Office of the United States Attorney for
the Southern District of New York
One St. Andrews Plaza
New York City 10007

Re: U.S.A. v. Victor Ramirez
76-359

Dear Mr. Carey:

I represent the defendant in the above-captioned criminal matter currently pending on the Magistrate's calendar. I understand that you are the Assistant who has been assigned the responsibility of prosecuting the case.

The complaint alleges a narcotics transaction between the defendant, his co-defendant, Gutierrez, and an informant. The purpose of this letter is to advise you that I intend to seek an order requiring revelation of the informant's identity and the assistance of the Government in locating him. A further reason for this letter is to ask that you immediately begin to undertake measures calculated to insure that the Government will be in a position to comply with the order I intend to seek.

If, without an order, you are willing to provide me with the information and assistance I require, please advise me of that fact.

Very truly yours,

STUART HOLTZMAN

SH:ymb
cc: Barbara Ann Rowan

10 Now, this is now approximately 4:00 o'clock.
11 He arrives back in front of the grocery store and he
12 stands there for about an hour and 20 minutes and at 5:40
13 approximately, a Corvette drives up. Two occupants, a
14 male and a female. The passenger, who is the male, gets
15 out and he is recognized as Herminio Gutierrez. He walks
16 over -- I'm sorry, I am getting mixed up-- this was two
17 males. The male driver was unidentified. And both of
18 them get out and they walk over to Rene. The male driver
19 stops for a brief moment and then goes into the grocery
20 store.

21 Cuba continues to have a conversation with
22 Rene Rivera. Five minutes or so later he gets back in
23 the car. The driver has since returned to the car and they
24 drive off.

25 On Wednesday you heard a reading of the

1 12:g 38

2 transcript of the conversation that took place.

3 Let me just review for you a few items of what
4 was said at that meeting.

5 Rene asked Cuba a direct question: "How much
6 do you charge for an eighth?"

7 "Cuba: One-eighth?"

8 "Rene: Yes.

9 "Cuba: If you buy... look, if the package
10 is worth 12, right?

11 "Rene: No, but I don't want a package.

12 "Cuba: No, but let me tell you one thing.
13 To sell an eighth... half of the package is worth 6 (un-
14 intelligible) which is four ounces and a quarter. Those
15 six mean that the guy who is going to sell it isn't going
16 to make any profit because the eighth sells for 78 and
17 75."

18 Rene continues:

19 "Well, I can give you... hmmm... five thousand
20 first. Then I'll give you one thousand on Monday.

21 "Cuba: All right. When?

22 "Rene: So... on.... 20 minutes."

23 Then Cuba says: "Go to Exis. There you talk to
24 Victor. You tell Victor that you are going to go by
25 there."

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2 Later on in that same conversation Cuba says:

3 "Go by Elvies and the you (unintelligible) in
4 the restaurant. Tell me where you are going to be so that
5 I can tell Victor. You see Victor there."

6 Again later in the conversation Rene says:

7 "At 6:00 o'clock I'm going to be here. OK?
8 Then I give him the money. I give him \$5000. Right?"

9 "Cuba: All right."

10 Cuba drives off and Rene goes very shortly
11 thereafter and he meets again with Sergeant McHale and
12 at that time Detective Vallyely told us on the stand he
13 gave him \$5000 which he had previously counted.

14 Rene took the money, put it in his pocket and
15 they drive back to Pitt Street.

16 At about a quarter to six they arrive back
17 there. Detective Vallyely goes back into the surveillance
18 truck. Sergeant McHale goes back to his position under
19 the Williamsburgh Bridge and Rene goes back in front of the
20 grocery store and he stands there for 25 minutes.

21 At 6:10, 25 minutes later, the El Dorado
22 Cadillac drives up. That's the one with the license plate
23 406 YCO, the very license plate that was discovered seven
24 months later in the trunk of the car which Victor Ramirez
25 was driving at the time of his arrest.

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2 That car drives up. Rene Rivera goes over,
3 leans into the driver's side and begins to talk to the
4 occupants.

5 Now you will remember that Detective Valleyly
6 could only see the passenger. He couldn't tell who was
7 driving the car and he identified the passenger as
8 Herminio Gutierrez. Sergeant McHale was too far away
9 to see who was in the car.

10 There is a conversation. That conversation
11 was tape-recorded and I will go through with you some
12 of the significant items in that conversation.

13 In the first page of the transcript, very near
14 the beginning of the conversation, Cuba says: "Then
15 how much are you going to give me?"

16 And Rene answers, "\$5000 first, you know, then
17 on Monday or Tuesday I'll give you the other thousand."

18 He reaffirms the original agreement that he
19 had proposed when he met with Cuba alone.

20 Now, at this time the El Dorado drives off
21 and it is being followed by Special Agent William Mockler
22 and Sergeant McHale in different cars.

23 This again is where you will have to piece
24 together the pieces of surveillance evidence. Special
25 Agent Mockler drove past the El Dorado and did not look in

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2 to see who was in it, drove past and observed it from his
3 rear view mirror. He drove up to the corner of Rivington
4 and kept going. The Cadillac pulls away, Sergeant
5 McHale gets behind it and follows it. Now, at the corner
6 of Rivington, the Cadillac turns left so all of a sudden
7 Sergeant Mockler is out of the picture-- sorry, Special
8 Agent Mockler. Sergeant McHale continues to follow
9 it and he follows it north on Norfolk Street where it
10 stops in front of a social club and Cuba gets out.

11 By this time Special Agent Mockler has made
12 his big swing around and has now cut up to the surveil-
13 lance car that Sergeant McHale was driving.

14 Sergeant McHale gets out of his car, gets in
15 with Special Agent Mockler and the two of them take off
16 in order to catch the Cadillac which has since left and
17 they catch the Cadillac at the corner of Houston Street
18 where it stops, makes a turn, parks, and Rene Rivera, the
19 driver, gets out.

20 This is the first time that the surveillance
21 officers are able to verify what the tape later verified,
22 and that is that Victor Ramirez was driving the car and
23 he was a participant in that second conversation that was
24 tape-recorded.

25 Special Agent Mockler drives back, drops

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2 McHale off and then goes back in order to catch up with
3 the El Dorado Cadillac on Houston Street.

4 McHale goes back and follows Rene Rivera who
5 been during this period of time . . standing in front of
6 the grocery store under the surveillance of Detective
7 Vallely.

8 When Rene Rivera goes, Sergeant McHale goes
9 behind him and they meet at a prearranged location.

10 The El Dorado Cadillac starts to go east on
11 Houston Street, Mockler is following it and loses it.

12 Where does Mockler go to? He turns around,
13 he has been in radio communication with the other units,
14 he goes back to the corner of Ridge and Stanton Street,
15 in fact, one block west of Ridge and Stanton Street.

16 The surveillance truck being driven by Felix
17 Demicco puts Detective Vallely in it, also goes to the
18 corner of Ridge and Stanton Street and finally Rene Rivera
19 followed by Sergeant McHale goes back to Pitt Street, parks
20 his car there, get sout and then begins to walk in the
21 direction of Ridge and Stanton Street.

22 Sergeant McHale himself sets up a surveillance
23 position in that vicinity.

24 Now what happens at approximately 7:00 or 7:05
25 that evening? Rene Rivera arrives at the corner of Ridge

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2 and Stanton Street. He meets with the defendant Victor
3 Ramirez. We know that because we have heard the testi-
4 mony of Detective Vallely, Special Agent Mockler and be-
5 cause we had the surveillance photographs that were being
6 taken by Detective Vallely.

7 You will have an opportunity to see them at
8 greater length in the jury room during your deliberations.

9 There is a conversation that goes on briefly
10 in the street between Rene Rivera and Victor Ramirez.
11 If you take a look at Government's Exhibit 17 in evidence,
12 which is one of the photographs of that meeting, you will
13 see that Rene Rivera is pointing across the street.

14 The opening lines of the transcript are this:

15 "Rene: I have gone around about a thousand
16 times and I got lost over there. I came out there. I
17 don't know this very well."

18 "Victor: Yes."

19 "Rene: That I went around a thousand times.
20 I went in the wrong way. The cops almost stopped me over
21 there."

22 "Victor: They were going to stop you?

23 "Rene: Yes. Over there when I was going to
24 go through there."

25 So the transcript depicts in words what the

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2 picture shows visually.

3 They meet, they have that preliminary conver-
4 sation. Rene points across the street and then the two
5 of them have a further conversation which is picked up in
6 the transcript.

7 Victor starts off with an unintelligible state-
8 ment. Concludes: "the money on you?"

9 Rene says: "Yes."

10 Victor says: "Come on."

11 And then the two of them walk down the street
12 and they turn together into the courtyard at 195 Stanton
13 Street. They are in there for perhaps five minutes and
14 then they come back out. When they come back out, you
15 will recall the testimony of Detective Vallely that they
16 did not come out together. Rene came out first and
17 turned up the street. Victor came out and started to cross
18 the street holding in his hands money, bills which he was
19 counting.

20 And if you take a look at Government's Exhibit
21 22 in evidence, you can see quite clearly Victor crossing
22 the street holding between his hands what appears to be
23 money.

24 Let's turn to the transcript, the last portion
25 of the transcript, what was said inside the building

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2 between Victor and Rene just before that scene took place.

3 "Rene: Count it.

4 "Victor: Such a small deal for this.

5 "Rene: Count it so that there, there isn't
6 any missing later.

7 "Victor: I'll count it over there.

8 "Rene: Then I -- a thousand dollars -- then on
9 Monday or Tuesday ...

10 "Victor: Yeah. That's fine.

11 "Rene: (Unintelligible) OK.
12 There's some money missing. You let me know,
13 you hear?"

14 Victor says something inaudible.

15 "Rene: OK."

16 There is a sound of footsteps and Rene's last
17 statement is "You let me know, you hear? Is it all right?"

18 Then they emerge from the building and Victor
19 Ramirez is counting money.

20 Now when Victor gets into his car across the
21 street he backs down Stanton Street, turns north on
22 Attorney Street and he is being followed by Special Agent
23 Mockler. Unfortunately Mockler did not, could not keep
24 the surveillance. He lost him in the traffic. So where
25 does Mockler go as soon as he no longer can follow the

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2 El Dorado Cadillac? He turns and he drives to the corner
3 of Prince and Elizabeth Street and when he gets there,
4 what does he see? The same El Dorado Cadillac, license
5 plate 406 YCO.

6 When he first sees it, he doesn't see a pas-
7 senger in it. He thinks it is unoccupied. What happens
8 next? Out of a car service on the corner of Prince and
9 Elizabeth Street comes Cuba and Rene gets out -- I'm
10 sorry, Victor gets out of the El Dorado Cadillac and meets
11 Cuba in the middle of the street and they go back into that
12 car service.

13 Remember the car service at Prince and
14 Elizabeth Street?

15 Then after a few minutes Victor comes back
16 outside, opens the driver's side door of the Cadillac and
17 sits in it with his feet still on the pavement and at
18 that time-- I'm sorry, this is not Mockler, who is doing
19 this, this is Sergeant McHale. Sergeant McHale drives
20 by, takes a look, identifies clearly as Victor Ramirez
21 and then he drives back to meet with Special Agent
22 Mockler.

23 Special Agent Mockler has followed Rene Rivera
24 back to a meeting place and when he gets back there he
25 searches Rene and he discovers not \$5000, he discovers

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2 Government Exhibit 4 in evidence which just happens to be
3 approxim-tely 4 ounces of Mexican brown rock heroin, ex-
4 actly what was being negotiated for in the transcript.

5 When McHale gets back there you will remember
6 it was McHale who searched Rene's car and he found no
7 contraband and he found no \$5000.

8 What clearly happened, ladies and gentlemen,
9 is that the \$5000 that was given to Rene Rivera earlier
10 in the day turns into a package of heroin worth almost
11 that much but not quite.

12 There is still \$1000 lef to be paid off. That
13 takes place the following week on August 20. We have
14 the transcript that was read this morning of that occur-
15 rence. That is Government's Exhibit 8 in evidence.

16 And let me read you two excerpts from that.
17 This is the meeting between Cuba and Rene Rivera.

18 Rene says: "This last material, you know... it
19 was good, you know... but it was a trifle short...about
20 a quarter of an ounce, about a quarter of half an ounce."

21 Cuba responds: "All right."

22 He clearly knows what he is talking about be-
23 cause that's precisely the transaction that he had
24 negotiated for the week before.

25 On the third page of the transcript Rene says:

2 "Here are the \$1000."

3 Cuba says, "The \$1000 are there?"

4 And Rene says: "Yes."

5 What is obviously going on is the payoff of
6 the last \$1000.

7 To says later in front of Prince and Elizabeth
8 Streets, Rene meets again with Cuba, this time about
9 3:25 in the afternoon.

10 On the second page of the transcript Rene
11 says: "Listen, et... how much money did I give you that
12 day?"

13 Cuba says: "There were \$1000 there. What hap-
14 pened?"

15 "Rene: Did you count it?

16 "Cuba: Victor and I counted it.

17 "Rene: Did you count again?

18 "Cuba: Yes. And Victor."

19 So what had happened was that Victor made the
20 transaction on August 15, picked up the \$5000, dropped
21 off the one-eighth kilogram.

22 The following week Cuba received the additional
23 \$1000 and he and Victor sit down and they both count it out
24 and that, ladies and gentlemen, is in essence what has
25 happened.

CERTIFICATE OF SERVICE

May 31, 1977

I certify that a copy of ~~this~~ appendix has been mailed to the United States Attorney for the Southern District of New York.

Jonathan J. Gelbermann